Info

VERSIONS: Full volume

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and Procedure in
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Appellate Practice and Procedure in Wisconsin

Ninth Edition

Includes 2023–24 Supplement

Michael S. Heffernan

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Summary of Developments

Developments Reported in the 2023–24 Supplement

The 2023–24 supplement to *Appellate Practice and Procedure in Wisconsin* reflects legal developments since publication of the 2022–23 supplement. In particular, the 2023–24 supplement includes discussions of the following:

The Wisconsin Supreme Court, in ruling on a petition for a supervisory writ in 2022, discussed the interplay between venue statutes and the Wisconsin Administrative Procedure Act. *See* Supp. § 1.6.

In a 2023 opinion, the Wisconsin Supreme Court explained why it did not need special justifications to overrule a Wisconsin Court of Appeals decision. *See* Supp. § 3.21.

The Wisconsin Supreme Court, in a 2023 decision, reiterated the burden that applies when proving harmless error. *See* Supp. § 3.22.

A 2023 Wisconsin legislative enactment established a new form of certiorari review for final decisions of a local governing body concerning applications related to residential development. *See* Supp. §§ 5.4, 15.5, 28.27, app. C.

In a 2023 opinion, the Wisconsin Court of Appeals discussed the standard for determining whether an appeal is frivolous and might warrant the imposition of sanctions. *See* Supp. § 16.5.

As of July 1, 2023, the Wisconsin Supreme Court has completed its transition to electronic filing (e-filing) for all but judicial disciplinary proceedings and attorney regulatory proceedings. *See* Supp. §§ 19.1, 22.4, 23.3, 23.12, 23.13, app. E.

Supplement section 25.3 adds a discussion about the surge in original actions in the Wisconsin Supreme Court that occurred during the COVID-19 pandemic.

Supplement sections 27.1, 27.21, and 27.34 incorporate amendments to the Wisconsin Supreme Court Internal Operating Procedures that were adopted in April 2023.

The Wisconsin Supreme Court, in a 2022 opinion, discussed the primary-jurisdiction doctrine that can arise when both a court and an administrative agency have jurisdiction over resolution of issues in a dispute. *See* Supp. § 28.5.

The Wisconsin Supreme Court, in a 2022 decision, explained the circumstances under which a circuit court can expand the record on review of an agency's decision when a claimant alleges irregularities in the agency's procedure. *See* Supp. § 28.16.

Finally, as part of this supplement's updates to the book's appendices, the "Standards of Appellate Review" appendix (prepared by Wisconsin Court of Appeals Judge Thomas Hruz and District Staff Attorney Nathan Petrashek) contains new references to recent appellate opinions discussing standards of review and updates several preexisting discussions, *see* app. C; and the "Forms" appendix, reviewed by Wisconsin Court of Appeals Chief Staff Attorney Christina Plum and Wisconsin Supreme Court Commissioners Timothy Barber and Nancy Kopp, contains updated annotations to the sample forms, s*ee* app. E.

Developments Previously Reported in the 2022–23 Supplement

The 2022–23 supplement to *Appellate Practice and Procedure in Wisconsin* reflects legal developments since publication of the 2021–22 revision. In particular, the 2022–23 supplement includes discussions of the following:

The Wisconsin Supreme Court, in a 2021 opinion, reiterated that it is the only court with the power to overrule, modify, or withdraw language from a published opinion of the court of appeals. *See* Supp. § 1.3.

The Wisconsin Supreme Court, in a 2022 decision, clarified the proper procedure for raising an objection in an arbitration proceeding. *See* Supp. § 3.4; *see also* app. C.

The Wisconsin Supreme Court, in a 2021 opinion, decided whether Wisconsin should permit trials based on stipulated facts and a stipulated finding of guilt. *See* Supp. § 3.6.

The Wisconsin Court of Appeals, in a 2021 decision, provided guidance for parties to preserve their appeal rights in cases involving settlement agreements. *See* Supp. § 3.6.

The Wisconsin Supreme Court, in a 2022 opinion, reiterated the type of error a circuit court must make for an appellate court to provide a remedy under the plain-error doctrine. *See* Supp. § 3.8.

The Wisconsin Supreme Court, in a 2022 decision, discussed the rule of evidence that addresses whether Wisconsin courts can judicially notice the laws of foreign countries. *See* Supp. § 7.5, app. C.

The Wisconsin Supreme Court, in a 2022 opinion, limited the circumstances in which an order for the involuntary administration of medication can be stayed automatically on appeal in a criminal case. *See* Supp. § 14.2.

The Wisconsin Supreme Court, in a 2022 decision, clarified the standard for granting a stay of an injunction pending appeal, setting forth considerations for evaluating one factor in that standard—whether the moving party is likely to succeed on appeal. *See* Supp. § 14.2.

The Wisconsin Supreme Court, in a 2022 opinion, discussed whether certain burden-shifting procedures apply to a defendant's challenge of a conviction for a prior charge of operating a motor vehicle while intoxicated when the relevant hearing transcript from the prior conviction is no longer available. *See* Supp. § 19.11.

As part of its ongoing e-filing pilot project, the Wisconsin Supreme Court amended its previously revised interim rule affecting procedures for e-filing documents in that court. *See* Supp. §§ 22.4, 23.5.

The Wisconsin Supreme Court, in a 2022 opinion, continued to refine its guidance about the standards by which courts should review administrative agencies' decisions. *See* Supp. § 28.5.

The Wisconsin Court of Appeals, in a 2021 decision, reiterated the nature of an administrative agency decision that qualifies it as a final decision for the purpose of judicial review under Wis. Stat. ch. 227. *See* Supp. § 28.7.

Finally, as part of this supplement's updates to the book's appendices, the "Standards of Appellate Review" appendix (prepared by Wisconsin Court of Appeals Judge Thomas Hruz and District Staff Attorney Nathan Petrashek) contains new references to recent appellate opinions discussing standards of review, *see* app. C; and the "Forms" appendix, reviewed by Wisconsin Court of Appeals Chief Staff Attorney Christina Plum and Wisconsin Supreme Court Commissioners Nancy Kopp and Timothy Barber, contains updated annotations to the sample forms, s*ee* app. E.

Developments Previously Reported in the 2021–22 Revision

The 2021–22 revision of *Appellate Practice and Procedure in Wisconsin* incorporated legal developments reported in the 2020–21 supplement and also included new information.

Most significantly, the Wisconsin Supreme Court approved new rules governing e-filing of appellate documents. On July 1, 2021, the new rules took effect for appeals to the Wisconsin Court of Appeals. On the same date, the Wisconsin Supreme Court began following an interim rule under which it is phasing in e-filing for documents submitted to that court. *See* §§ 22.4, 23.3, 23.5, 23.12, 23.13.

Updates have been made throughout the book's chapters to reflect the new e-filing rules. See, in particular, the revised procedures detailed in chapter 18. *See also, e.g.*, §§ 1.5, 1.6, 5.5, 5.15, 5.16, 5.20, 5.21, 7.1, 7.4, 8.2, 10.3, 14.3, 16.4, 19.1, 19.28, 19.29, 20.2, 20.7, 26.2. Certain e-filing amendments affecting the book's discussions of specific procedures (briefing and motion practice) are highlighted for other chapters below.

In June 2021, the Wisconsin Supreme Court amended its internal operating procedures to place term limits on the chief judge of the Wisconsin Court of Appeals. *See* §§ 1.7, 27.62.

The Wisconsin Supreme Court, in a 2020 opinion, addressed whether a party's failure to raise an issue in the court of appeals had forfeited that party's right to raise the issue in the supreme court. *See* § 3.4.

The Wisconsin Court of Appeals, in a 2020 decision, stated the standard of appellate review of an order granting or denying a motion to suppress evidence. *See* § 3.19.

The Wisconsin Court of Appeals, in a 2020 opinion, discussed the doctrines of judicial estoppel and law of the case in the context of standards of appellate review. *See* § 3.21.

The Wisconsin Supreme Court considered the applicability of the doctrine of laches to an election-ballot challenge in 2020. *See* § 3.21.

The Wisconsin Supreme Court, in 2020, discussed the principle of stare decisis and noted the criteria it considers when determining whether to overturn decisions. *See* § 3.21.

The new e-filing rules concerning delegation of authority to electronically sign a notice of appeal are a departure from case law on this issue. *See* § 5.11.

Revised procedures for e-filing a docketing statement are discussed in sections 5.18, 5.19, and 15.9. The Wisconsin Court of Appeals also issued an interim update in 2021 to its corresponding internal operating procedures. *See* § 21.30.

The discussion of the typical procedures for obtaining a court reporter's signature on a certification of a request for a transcript has been updated. *See* § 7.2.

In a 2021 opinion, the Wisconsin Supreme Court considered whether the court of appeals acted within its discretion by denying a petition for leave to appeal without explaining the reasons for its denial. *See* § 9.11; *see also* app. C.

For discussions of briefing procedures affected by the July 2021 e-filing amendments, see sections 11.2, 11.5, 11.6, 11.7, 11.14, 11.15, 11.17, 11.18, 11.20, 11.21, 11.23, 11.25, 11.27, 11.28, 11.29, 11.30, 11.31, 17.4, and 23.5.

For discussions of motion-filing procedures affected by e-filing amendments, see sections 13.3 and 13.4.

Section 15.10 has been updated to reflect that the presubmission conference procedures in expedited appeals vary depending on the court of appeals district in which the docketing statement is filed.

The Wisconsin Supreme Court amended the rule of appellate procedure governing pro hac vice admission, substitution, and withdrawal of retained counsel in appellate proceedings, effective July 1, 2021. *See* § 18.13.

In two decisions in 2020, the Wisconsin Supreme Court denied, on delay-related grounds, petitions for original jurisdiction in that court involving challenges to election ballots and the governor's partial vetoes of a budget bill. *See* § 25.3.

In 2021, the Wisconsin Supreme Court discussed the nature of an injury required to confer standing to obtain judicial review of a Department of Administration decision under Wis. Stat. § 227.52. *See* § 28.8.

The Wisconsin Court of Appeals, in a 2021 opinion, observed that the Wisconsin Supreme Court's 2018 discussion in *Tetra Tech* of the standard of judicial review for agency decisions did not abrogate the standard of judicial review for municipal decisions. *See* § 28.27; *see also* app. C.

The Wisconsin Court of Appeals, in a 2020 decision, stated some general principles that apply when a court remands a case to an administrative body that initially applied an incorrect legal standard to its findings. *See* § 28.27.

The Wisconsin Supreme Court, in a 2020 opinion, determined the triggering event for certiorari review of a zoning board of appeals decision under Wis. Stat. § 62.23(7)(e)10. *See* § 28.27.

Finally, as part of this new edition, the appendices to the book have been revised. Judge Thomas Hruz of the Wisconsin Court of Appeals, District III, and Wisconsin Court of Appeals District Staff Attorney Nathan Petrashek, District II, have added new appellate court citations to the "Standards of Appellate Review" outline in appendix C. In addition, Wisconsin Court of Appeals Chief Staff Attorney Christina Plum and Wisconsin Supreme Court Commissioner Julie Rich have reviewed and proposed updates to the sample annotated forms in appendix E, particularly in light of new e-filing procedures. Appendix F provides a reprint of the Wisconsin Rules of Appellate Procedure, incorporating the e-filing amendments that took effect on July 1, 2021.

Dedication

This book is dedicated to the memory of the late Nathan S. Heffernan, former Chief Justice of the Wisconsin Supreme Court

Foreword

In the early 1980s, David Walther, a well-respected Milwaukee lawyer with years of appellate experience, graciously agreed to update the seminal book on Wisconsin appellate practice, which had been written for the State Bar of Wisconsin by Robert J.

Martineau and Richard R. Malmgren in 1978. But Attorney Walther soon decided that, because of the many appellate rule changes and the growing case law since the Martineau & Malmgren publication, that earlier work could not be given just a fresh coat of paint. This decision prompted David and his colleagues, Michael Heffernan and Patricia Grove, to take on the immense task of organizing, researching, and writing a new handbook for Wisconsin lawyers.

Thanks to these efforts, along with the helpful comments and suggestions of the first edition's editorial review committee and other contributors, the result was an outstanding, well-conceived practice handbook—a major work on appellate practice and procedure in Wisconsin that has been relied on by thousands of attorneys over the years.

The State Bar of Wisconsin is pleased to now publish the ninth edition of this respected resource. We are greatly indebted to Michael Heffernan for his dedicated effort in revising the book, particularly in this challenging year of extensive new appellate rules on electronic filing procedures.

We also wish to thank the Honorable Thomas Hruz, of the Wisconsin Court of Appeals, District III, and Wisconsin Court of Appeals District Staff Attorney Nathan Petrashek, District II, for contributing to the standards of appellate review outline. In addition, we acknowledge the invaluable contributions of Christina Plum, the Chief Staff Attorney of the Wisconsin Court of Appeals, and Julie Rich, Court Commissioner for the Wisconsin Supreme Court, who updated the forms in this book for the current edition and provided guidance on the forms' annotations.

Finally, we wish to acknowledge the State Bar staff who supported this revision throughout the production and editorial process.

Carol A. Chapman, Esq.
Publications Manager
State Bar of Wisconsin

Preface

In 1985, I left employment as a staff attorney for the Wisconsin Court of Appeals, and commenced my career as a private practitioner at Walther and Halling, a small Milwaukee firm known for its appellate practice. On my first day, David Walther took me aside and advised me that he and Pat Grove were writing a book on appellate procedure for the State Bar. Because I was a new lawyer with no case assignments, he asked if I would take over the project, suggesting that a "couple of weeks" might be necessary to whip the book into shape. After almost three months of full-time work, and many more months of editing and revising, the book finally was published in 1986. All appellate practitioners owe David Walther a debt of gratitude for leading and financing the extraordinary effort that went into writing that first edition.

Since that time, there have been annual supplements, as well as major revisions. Over those years, many persons have shared their knowledge and experience with me. These include the Chief Staff Attorney of the Wisconsin Court of Appeals and the Clerk of the Wisconsin Supreme Court and Court of Appeals. In addition, I have relied on the assistance of various attorneys at the office of the State Public Defender (SPD) for assistance on the topic of criminal appeals. Most recently, I am grateful for the input of Jeremy Perri, SPD Regional Attorney Manager of the SPD Waukesha Trial Office, and Andrea Cornwall, Regional Attorney Manager of the SPD Milwaukee Appellate Office. The topic of administrative appeals has been reviewed by Jeffrey Shampo of the Wisconsin Division of Hearings and Appeals. I also would like to thank my son, Nathan Z. Heffernan, Esq., for his help with electronic research, which was necessary given that the COVID-19 pandemic kept this old lawyer away from the State Law Library, and thanks also to Heidi Yelk of the library staff for providing remote assistance and to my editor, Hana Miura, for shepherding the annual updates to publication. Last but not least, I thank my wife, Barb, for her invaluable support and assistance over the years.

One would assume that a narrow field like appellate practice would not witness significant change or controversy, but the continued outpouring of appellate cases and revisions to the Wisconsin Rules of Appellate Procedure show otherwise. In particular, the transition from paper filing to electronic filing has required extensive revisions. This book continues to be a work in progress, and I encourage readers to contact me with their suggestions, comments, and criticisms.

—Michael S. Heffernan

About the Author

Michael S. Heffernan practiced for many years with Foley & Lardner, LLP. Now retired, he limits his practice to divorce mediation. He received his B.A. from the University of Wisconsin-Madison and his J.D. from the University of Wisconsin Law School and served as a law clerk for the Wisconsin Supreme Court and as staff attorney for the Wisconsin Court of Appeals. Mr. Heffernan was a coauthor of the first edition of *Appellate Practice and Procedure in Wisconsin* in 1986 and has written all of the annual updates. Mr. Heffernan is a member of the State Bar of Wisconsin. He is also a past chair of the Appellate Practice Section of the State Bar.

Authors of the 1986 Edition

David L. Walther
Patricia L. Grove
Michael S. Heffernan

How to Cite This Book

Cite this book in briefs and legal memoranda as follows:

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[*See The Bluebook: A Uniform System of Citation* R. 15, B15.1 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).]

After the first full citation, you may cite this book as follows:

Appellate Practice and Procedure in Wisconsin, *supra*, § ____.

[*See The Bluebook: A Uniform System of Citation* R. 4.2(a), 15.10, B15.2 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).]

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Supplement: An Overview of Appellate Practice and Procedure in Wisconsin

Book pages supplemented: Overview-1 and Overview-6

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Page 6: Deleted Caution

An Overview of Appellate Practice and Procedure in Wisconsin

This overview introduces the basic concepts of appellate procedure and identifies the portions of the text in which these concepts are discussed. [1]

Wisconsin's Appellate System

Wisconsin's two-tiered appellate court system consists of an intermediate court of appeals and a supreme court. Each court has appellate, supervisory, and original jurisdiction. Appellate jurisdiction is most commonly invoked.

Final orders or judgments of the circuit courts may be appealed as of right to the court of appeals. Wis. Stat. § 808.03(1). Nonfinal orders may be appealed with permission of the court of appeals. Wis. Stat. § 808.03(2). There is no right of appeal to the Wisconsin Supreme Court. Appellate review in the supreme court occurs when that court, in the exercise of its discretion, grants review of a final court of appeals decision, Wis. Stat. § 808.10, or takes jurisdiction through a bypass procedure of an appeal pending in the court of appeals, Wis. Stat. § 808.05.

The structure of Wisconsin's appellate system is covered in more detail in chapters 1 and 2, *infra*.

Standards of Review

Standards of review, considered in chapter 3 and appendix C, *infra*, are guidelines that an appellate court uses to consider—and just as importantly, to limit its consideration of—certain matters on appeal. Most commonly, standards of review define the scope of review of questions of fact, law, and discretion.

Findings of fact made by a jury will be affirmed if supported by any credible evidence; a judge's factual findings will be affirmed if not clearly erroneous. Questions of law are reviewed de novo by an appellate court. Discretionary determinations by a circuit court are affirmed if made on any reasonable basis. These standards of review not only guide appellate courts in reaching their decisions, they guide attorneys in deciding which issues to pursue on appeal.

The concept of harmless error is similar to a standard of review in that it guides appellate courts in their review and may help attorneys in considering whether an error is worth raising on appeal.

Finally, one of the basic rules relating to standards of review is that, subject to a few exceptions, an issue is deemed forfeited or waived on appeal if not first raised in the circuit court.

Taking an Appeal as of Right

In almost all cases, appeals as of right must be taken only from final orders or judgments. Wis. Stat. § 808.03(1). A final order or judgment is one that disposes of the entire matter in litigation and has been reduced to writing and filed with the circuit court clerk. *See infra* ch. 4. Three exceptions to the finality rule are set forth in Wis. Stat, §§ 803.08(11) (class-action certifications and decertifications), 809.104(2) (orders or judgments relating to an electronics and information technology manufacturing zone), and 813.025(3) (orders suspending or restraining enforcement of a state statute). *See infra* ch. 4.

There are two methods of taking an appeal as of right. For civil cases, an appeal is commenced by the filing of a notice of appeal within 45 days after the entry (i.e., filing) of the judgment or order if a notice of entry has been given or within 90 days after entry if no notice has been given. Wis. Stat. § 808.04(1). A timely filing of the notice of appeal is crucial because the time for filing cannot be extended, and timely filing is essential to obtain subject-matter jurisdiction. *See infra* ch. 5.

For cases under Wis. Stat. § 809.30 (criminal cases, and cases under Wis. Stat. § 971.17 or Wis. Stat. chs. 48, 51, 55, 938, or 980, except for parental consent to abortion cases, termination-of-parental-rights cases, and minor-guardianship proceedings), a notice of appeal must also be filed, but not until a number of postconviction or postdisposition steps have been taken. Wis. Stat. § 809.30. The first of these steps is the filing of a notice of intent to pursue postconviction or postdisposition relief; this must be filed within 20 days after imposition of sentence or the final adjudication in a noncriminal case under Wis. Stat. § 809.30. *See infra* §§ 19.2–.12. Time limits may be extended, however, for appeals under Wis. Stat. § 809.30. *See infra* § 19.30.

Certain appeals are decided by a single court of appeals judge, rather than the regular three-judge panel. Appeals as of right in these cases are commenced either under the procedure for civil cases (small claims or traffic-regulation or municipal-ordinance violations) or under the procedure for Wis. Stat. § 809.30 cases (criminal cases or cases under Wis. Stat. § 971.17 or Wis. Stat. chs. 48, 51, 55, 938, or 980). *See infra* ch. 20.

Discretionary Review in the Court of Appeals

Appeals from nonfinal judgments or orders, i.e., those that do not terminate the entire matter being litigated, may be taken only with permission of the court of appeals. Permission is sought by filing a petition for leave to appeal with the court. The petition must convince the court that the case is worth adding to what might be an already-crowded docket.

The other major component of the court of appeals' discretionary jurisdiction is the court's power to grant supervisory relief, such as mandamus or prohibition, in cases involving both a clear legal right and breach of a clear legal duty. A petition for supervisory relief will be denied if any alternative relief is available. *See infra* ch. 10.

Review in the Supreme Court

The supreme court is primarily concerned with the administration of justice and the orderly development of the law. The supreme court rarely grants review of cases that present nothing more than error-correction issues. This emphasis is reflected in the criteria under Wis. Stat. § 809.62(1r) that the supreme court uses to assess a petition to review a final decision of the court of appeals. *See infra* ch. 23.

A petition to review must be filed with the supreme court within 30 days after the date of the court of appeals' decision. Wis. Stat. § 808.10(1). As with a civil notice of appeal, timely filing is essential and no extensions are granted. The petition should emphasize the institutional need for review in light of the statutory criteria, rather than focusing on the errors of the court of appeals. *See infra* ch. 23.

A party with an appeal or other proceeding pending in the court of appeals may attempt to bypass the court of appeals and seek direct review in the supreme court. A petition to bypass should address the same law-development criteria applicable to a petition for review. Bypass may also be initiated on certification by the court of appeals or on motion of the supreme court. As with any supreme court review, the decision to accept jurisdiction through bypass rests entirely in the discretion of the supreme court. *See infra* ch. 24.

In unusual cases, supreme court review may also be obtained by petition for original action or petition for supervisory relief. Original actions may be commenced in cases of particular significance to the public when an exigency warrants direct relief in the supreme court. *See infra* ch. 25. Supervisory relief by the supreme court should rarely be sought. *See infra* ch. 26.

After Appellate Jurisdiction Is Obtained

Once the court of appeals takes appellate jurisdiction by a party's filing of a notice of appeal or by the court's granting of a petition for leave to appeal, a number of steps must be taken to pave the way for the appellate decision. Because no testimony is taken in an appellate court, the case is decided on the trial record. The first step, therefore, is to order a transcript and file a statement on transcript with the clerk of the circuit court within 14 days after the filing of the notice of appeal. Wis. Stat. § 809.11(4). Once the

appellant makes these arrangements and files the statement on transcript, the preparation of the transcripts and compilation and filing of the record are the respective duties of the court reporter and the clerk of the circuit court. *See infra* ch. 7.

The filing of the record in the court of appeals triggers the briefing schedules set forth in Wis. Stat. § 809.19. The appellant's brief must be filed within 40 days after the filing of the record. The respondent's brief is due within the later of 30 days after the date on which the appellant's brief is filed (extended by an additional 3 days if the appellant's brief was served by mail), 30 days after the date on which the court accepts the appellant's brief for filing, or 30 days after the filing of the record in the court of appeals. A reply brief may be filed within the later of 15 days after service of the respondent's brief (extended by an additional 3 days if the appellant's brief was served by mail) or 15 days after the date on which the respondent's brief is filed. The appellant's brief and the respondent's brief must not exceed 50 pages each if a monospaced font or handwriting is used or 11,000 words each if a proportional serif font is used. Wis. Stat. § 809.19(8)(c)1. The appellant's reply brief is limited to 13 pages if a monospaced font or handwriting is used or 3,000 words if a proportional serif font is used. Wis. Stat. § 809.19(8)(c)2. Although both the briefing lengths and filing periods may be extended, motions to do so are discouraged. *See infra* ch. 11; *see also infra* ch. 18.

A respondent's brief may assert circuit court error as long as correction of that error would merely support the judgment or order on appeal. If correction of error asserted by a respondent would require reversal or modification, a cross-appeal must be filed. *See infra* § 8.3.

Once the briefs are filed, the court screens the matter and places it under submission for oral argument on briefs or per curiam disposition. Oral argument is rarely held in the court of appeals. *See infra* ch. 12.

The court of appeals has adopted an alternative method of disposition, which aims to expedite the decisional process in error-correction cases involving only one or two issues. Known as *fast-tracking*, this expedited appeal procedure involves simplified briefing rules, immediate submission, and disposition by order rather than opinion. Other methods of expediting disposition include advancement and summary disposition. In addition, statutes require preferential treatment of some appeals. *See infra* ch. 15.

Unless the supreme court orders otherwise in a particular case, the procedures governing appeals in the court of appeals also apply to review in the supreme court. Wis. Stat. § 809.63.

All documents must be filed and served. All documents must conform to a specified format. Electronic filing (e-filing) is required in cases in which the parties are represented by counsel or in filings by high-volume filing agents. *See* Wis. Stat. § 809.801. All other parties may file by traditional paper means but may file electronically if they choose. *See infra* ch. 18.

Caution. Although e-filing is now uniform in the circuit court and the court of appeals, it is being phased in for proceedings in the supreme court. *See infra* ch. 22.

The statutory rules of appellate procedure establish the method of calculating and enlarging the time for performing required actions. The appellate courts have broad authority to impose penalties for violations of the appellate rules. *See infra* ch. 18.

Motion practice is governed by Wis. Stat. § 809.14. The filing of a motion that may affect the disposition of an appeal or proceeding or the substance of a brief or of the record freezes all time periods until the motion is decided. *See infra* ch. 13. Relief pending appeal should first be sought in the circuit court. *See infra* ch 14. Release on bail in criminal cases may be sought when an appeal is commenced under Wis. Stat. § 809.30. *See infra* §§ 19.18–.20.

The internal operating procedures for the court of appeals (*see infra* ch. 21) and the supreme court (*see infra* ch. 27) set forth the specific decision-making processes used in those courts.

Postdecision Procedures

A prevailing party must file a statement of costs within 14 days after the filing of a court of appeals decision. Wis. Stat. § 809.25(1)(c). Attorney fees are almost never granted on appeal. The decision of an appellate court is not effective until the case is remitted to the circuit court. Remittitur occurs 31 days after the filing of the appellate court's decision. Wis. Stat. § 809.26(1). A party may file a motion for reconsideration of a court of appeals decision within 20 days after the date of the decision. Wis. Stat.

§ 809.24(1); *see infra* ch. 16. A motion for reconsideration may be filed in the supreme court within 20 days after the date of a decision by that court. *See infra* § 22.5.

While almost all supreme court opinions are published, only 12% of court of appeals decisions are published. Wis. Ct. of Appeals, *Court of Appeals Annual Report 2020*, https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=391847. The decision whether to publish is important because only published cases can be cited as precedential authority. Although not precedent, certain unpublished opinions may be cited for their persuasive value. *See infra* ch. 17.

Supplement Chapter 1
Introduction to the Wisconsin Appellate System

Book sections supplemented: 1.1, 1.3, and 1.6

1.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

1.3 Primacy of the Supreme Court in the Two-Tiered Appellate System

Page 7: Added Lira *citation to end of second paragraph in section*

When decisions of the supreme court appear to be inconsistent, the court of appeals follows the most recent decision. *Betthauser v. Medical Protective Co.*, 164 Wis. 2d 343, 350, 474 N.W.2d 783 (Ct. App. 1991), *aff'd*, 172 Wis. 2d 141, 493 N.W.2d 40 (1992). If a published court of appeals decision is in conflict with a Wisconsin Supreme Court decision, the court of appeals must follow the supreme court decision. *Madison Reprographics, Inc. v. Cook's Reprographics, Inc.*, 203 Wis. 2d 226, 238, 552 N.W.2d 440 (Ct. App. 1996). On the other hand, the principle of stare decisis requires the supreme court to follow court of appeals precedent unless compelling reasons exist to overrule it. *AllEnergy Corp. v. Trempealeau Cnty.*, 2017 WI 52, ¶ 55 n.20, 375 Wis. 2d 329, 895 N.W.2d 368. *But see State v. Lira*, 2021 WI 81, ¶ 45, 399 Wis. 2d 419, 966 N.W.2d 605 (stating that, while court of appeals precedent is an "important consideration, it is not determinative").

Page 8: Replaced fourth paragraph in section

Moreover, the court of appeals itself has recognized that, as an error-correcting court, it may not set or establish legal policy. *Aul v. Golden Rule Ins. Co.*, 2007 WI App 165, ¶ 41, 304 Wis. 2d 227, 737 N.W.2d 24. Although court of appeals opinions are considered precedent, only the supreme court has the power to overrule, modify, or withdraw language from them. *State v. Lira*, 2021 WI 81, ¶ 46, 399 Wis. 2d 419, 966 N.W.2d 605 (citing *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997)); *see also Milwaukee Transp. Servs., Inc. v. Family Dollar Stores of Wis., Inc.*, 2013 WI App 124, ¶ 17, 351 Wis. 2d 170, 840 N.W.2d 132 (acknowledging that only supreme court, not court of appeals, can modify language from previous court of appeals opinions). The court of appeals cannot even implicitly overrule its own decisions. *See City of Sheboygan v. Nytsch*, 2008 WI 64, ¶ 5, 310 Wis. 2d 337, 750 N.W.2d 475 (per curiam).

1.6 [Structure of Wisconsin Court of Appeals] Venue

Page 12: Added Kormanik *citation to end of first paragraph in section*

The four appellate districts of the court of appeals are used to determine venue. With the exception of appeals in which the sole defendant below was the state or an agent of the state, the statutes provide that a judgment or order appealed to the court of appeals must be heard in the court of appeals district that contains the court from which the judgment or order is appealed. Wis. Stat. § 752.21(1). In appeals in which the sole defendant below was the state or an agent of the state, the appellant may choose to decide the matter any district of the court of appeals other than the district that contains the court from which the order or judgment is appealed. Wis. Stat. § 752.21(2). All appeals and other proceedings taken to the court of appeals are routinely assigned by the clerk of court to the appellate district in which the court appealed from is located, unless the appeal is heard in another district selected by the appellant pursuant to Wis. Stat. § 752.21(2). In cases under Wis. Stat. § 752.21(2), the supreme court has granted supervisory relief when the court of appeals improperly venued the matter in a district other than the one selected by the appellant. *State ex rel. DNR v. Wisconsin Ct. of App.*, 2018 WI 25, 380 Wis. 2d 354, 909 N.W.2d 114; *see also State ex rel. Kormanik v. Brash*, 2022 WI 67, 404 Wis. 2d 568, 980 N.W.2d 948 (granting supervisory relief in venue dispute arising from Wis. Stat. ch. 227 appeal and discussing interplay between Wis. Stat. §§ 752.21(2), 801.50(3)(a), (b), and 227.40).

Chapter 1
Introduction to the Wisconsin Appellate System

I. Scope
[§ 1.1]

The two-tiered appellate court system, with an intermediate court of appeals and a supreme court, was a response to the burgeoning demand for appellate review. The origin of this system and the basic structure of the two appellate courts are outlined below. [1]

II. Origin of Two-Tiered Appellate System [§ 1.2]

Despite the fact that the U.S. Supreme Court has held that due process does not require appellate review, *Ross v. Moffitt*, 417 U.S. 600 (1974); *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954), appeal as of right is all but universally recognized. *See* Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis in Virginia*, 57 Va. L. Rev. 3, 12–13 (1971).

This acceptance of the right to appeal, along with an increased accessibility to the appellate courts, culminates a long process of appellate reform that continues to this day. *See* Robert J. Martineau, *Modern Appellate Practice* 8 (1983). Modern reforms reflect efforts to cope with the growing appellate caseload, and include simplified procedures, shorter and less formal briefs and opinions, curtailment of oral argument, the creation of additional appellate courts, and extensive staffs for these courts.

These reforms are sometimes controversial, however, because they are directed at a general caseload problem and not necessarily at ensuring thorough review in any given case. The appellate attorney operates in an environment of flux, in which numbers threaten to become a matter of overwhelming importance. Attorneys can best serve the rapidly evolving appellate system by criticizing those practices that are intolerable, tolerating those practices that are essential, and hoping for the common sense to tell the difference.

The essential elements of a quality appellate system include

1. Prompt review by a body of judges of the merits of the final judgment of the trial courts;

2. A statement of reasons by the appellate court, rendered after the parties have submitted their views on the issues; and

3. Such consideration by the judges as the complexity of the appeal dictates.

Id. at 10.

Wisconsin attorneys are fortunate to have an appellate court system that embodies these essentials while actively seeking new ways to minimize the backlogs and delays that plague our nation's court systems. Indeed, the very creation of the current Wisconsin appellate system represents an institutional statement of that system's dedication to reform.

Wisconsin's court of appeals began operating on August 1, 1978. Until that time, there had been little substantive change in the structure of the court system. The county and circuit courts were the courts of general original jurisdiction, with appeals taken from county court to circuit court and from circuit court to the supreme court.

In the late 1960s, however, it became apparent that appellate reform was necessary. The number of appeals to the supreme court was increasing each year, and the court was unable to keep current with its caseload. As the backlog of pending cases became unmanageable, various proposals for court reform were advanced, including the creation of an intermediate court of appeals. *See* E. Harold Hallows, *The Case for an Intermediate Appellate Court*, Wis. Bar Bull., Apr. 1971, at 15. In 1971, two committees formed to study the court system proposed that an intermediate appellate court be established.

The supreme court contracted with the National Center for State Courts to conduct an independent study of the appellate process in Wisconsin. The center issued a report in late 1975, recommending the establishment of an intermediate appellate court, primarily because of its findings that the workload of the supreme court was steadily increasing. For example, the number of appeals pending per year increased 180% between 1969 and 1974. Although the court adjusted its internal procedures in an attempt to meet the increased demand, it was unable to keep current with the caseload: on average, 16 months elapsed between the docketing of an appeal and the issuance of remittitur.

Part of this delay was caused by the wide range of appealable orders and judgments. Although the rule limiting appeals to final orders or judgments was recognized in principle, it was ignored in practice because of statutory exceptions allowing appeals as of right from numerous specified nonfinal dispositions.

In making its recommendation for an intermediate appellate court, the National Center for State Courts stated that the current and projected size of Wisconsin's appellate caseload mandated the formation of a new court as the only long-term solution to the problem created by appellate volume. Nat'l Ctr. for State Cts., *Wisconsin Appellate Practice and Procedure Study Final Report*, 60 Marq. L. Rev. 649 (1979). As a result of the prodding of Chief Justice E. Harold Hallows and his successors, Horace E. Wilkie and Bruce F. Beilfuss, a constitutional amendment was enacted in 1977 that provided the basis for an intermediate court of appeals and a radically revised Wisconsin court system. Wis. Const. art. VII, § 2.

Under the amendment, the two-tiered trial court system was replaced by a two-tiered appellate system. The county and circuit courts were merged into a single set of circuit courts, and a court of appeals was created to alleviate the appellate burden on the supreme court. The amendment also directed the legislature to enact legislation enabling the new court to commence operations on August 1, 1978, Wis. Const. art. XIV, § 16(5) (repealed 1982); the amendment further directed the legislature to establish one or more judicial districts, to provide for election of judges, and to determine the court's jurisdiction, Wis. Const. art. VII, § 5.

In chapter 187, Laws of 1977 (now codified in Wis. Stat. chs. 752 and 808), the legislature fulfilled its duty by providing for the organization of the court of appeals and, just as importantly, simplified the definition of appealable orders and judgments. The legislation not only provided for a new court to shoulder part of the appellate burden, it also shifted the bulk of that burden to the new court of appeals in a major reallocation of appellate duties and functions. Wis. Stat. § 808.03(1) directs appeals as of right to the court of appeals. The supreme court has no mandatory appellate jurisdiction, but it can review court of appeals decisions, Wis. Stat. § 808.10, or direct that an appeal bypass the court of appeals and proceed directly to the supreme court, Wis. Stat. § 808.05.

This scheme provides the supreme court with discretionary authority to control its caseload. It also recognizes the court of appeals as the court with the primary responsibility for correcting circuit court errors and as, ordinarily, the court of last appellate resort. The supreme court, on the other hand, assumes a more scholarly role with an emphasis on supervising the orderly development of Wisconsin law.

An equally significant aspect of the appellate court reorganization is that the legislature severely limited the scope of the court of appeals' mandatory appellate jurisdiction. Wis. Stat. § 808.03(1) provides for appeals as of right from final orders or judgments. Other orders or judgments may be reviewed only with permission of the court. Only three exceptions to the finality rule now exist: injunctions or orders suspending or restraining enforcement of a state statute are immediately appealable as a matter of right, Wis.

Stat. § 813.025(3), as are orders or judgments relating to an electronics and information technology manufacturing zone, Wis. Stat. § 809.104(2), and certifications and decertifications in class actions, Wis. Stat. § 803.08(11).

Comment. The legislative creation of the three exceptions just noted is regrettable. A major benefit of the 1977 reorganization legislation was the elimination of a long list of exceptions to the finality rule, with the goal of simplifying appellate practice and eliminating traps for the unwary. By creating new exceptions, the legislature has created new traps and complicated the appeals process.

More than 40 years have passed since the court reorganization took effect. Has it been successful? In terms of the time from notice of appeal to decision on appeal, the answer is yes. Contrary to critics who suggested that the supreme court's backlog would simply become a court of appeals backlog, it is clear that the court of appeals is doing its job. Despite starting with a backlog of more than 400 cases transferred from the supreme court, and despite continued filing increases, the court of appeals continues to decide 3-judge opinion cases in an average of 15 months, 1-judge opinion cases in approximately 9 months, and expedited appeals, *see infra* §§ 15.6–.11, in less than 6 months. *See* Wis. Ct. of Appeals, *Court of Appeals Annual Report 2020*, https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=391847. Contrasted with delays of up to 2 years before reorganization, which had the effect of discouraging appeal, the current system is clearly more accessible.

This enhanced accessibility is not without problems, however. By encouraging more appeals, the greater accessibility may eventually lead to the same kind of excessive backlogs and delays that were associated with the previous appellate court system. The planners of the court of appeals underestimated the projected annual case filings in almost every category of case. The impact of assigning appeals to the court of appeals in cases that had formerly been appealed from county court to circuit court was not anticipated. But, more than that, it appears that the creation of the new court, in itself, prompted an increase in the number of the appeals.

Nonetheless, the court of appeals represents a significant improvement over the excessive delays of the pre-reorganization appellate process. With the continued growth of the court of appeals, including additional judges and staff, and the court's willingness to experiment with expediting procedures, such as expedited (fast-track) briefing and mediation, a radical increase in the court's disposition time does not appear imminent. Moreover, the quality of the court of appeals' work continues to be excellent, although the struggle of quality versus quantity is obviously an ongoing contest.

The tremendous increase in the caseload and productivity of the court of appeals since that court was created is reflected in the following statistics set forth in *Cascade Mountain, Inc. v. Capitol Indemnity Corp.*, 212 Wis. 2d 265, 569 N.W.2d 45 (Ct. App. 1997). When the 12-judge court of appeals was created in 1978, it was anticipated that within five years it would reach its capacity of 1,200 appeals annually, or 100 opinions per judge. However, in 1979, the court's first full year of operation, 1,986 appeals were filed—165 opinions per judge. In 1991, 2,970 appeals were filed in a 14-judge court, or 212 opinions per judge. In 1996, 3,628 cases were filed in a 16-judge court—227 opinions per judge. These numbers of cases do not include petitions, motions, and miscellaneous matters that the court also must decide. *Id*. at 270 n.3; *see also State v. Smythe*, 225 Wis. 2d 456, 466, 592 N.W.2d 628 (1999). Current information on filings is available in the annual statistical reports for the court, which are posted on the Wisconsin Court System's website, at https://www.wicourts.gov/other/appeals/statistical.jsp (last updated Sept. 7, 2021).

The reorganization of the appellate court system has also had a significant impact on the supreme court. Although it must now review petitions for discretionary review of court of appeals decisions, the supreme court decides fewer appeals and writes longer opinions with more concurrences and dissents. Although some may criticize these developments, they do reflect the supreme court's emphasis on law development rather than error correction under the reorganized court system. This is not to say that the supreme court never takes an appeal with a view to reversing an error by the court of appeals. But, for the most part, the court of appeals is indeed the court of last resort, while the supreme court picks and chooses the cases it deems worthy of further review.

III. Primacy of the Supreme Court in the Two-Tiered Appellate System [§ 1.3]

The creation of an intermediate appellate court also created a new set of issues arising out of the relationship between the two courts. The court of appeals is bound by supreme court precedent "regardless of the extent of our agreement, or our disagreement, with it." *State v. Carviou*, 154 Wis. 2d 641, 644–45, 454 N.W.2d 562 (Ct. App. 1990). The court of appeals has held, however, that it

is not bound by a Wisconsin Supreme Court decision if that decision is based on federal law that is no longer in accord with the decisions of the U.S. Supreme Court, *Regent Ins. Co. v. City of Manitowoc*, 205 Wis. 2d 450, 556 N.W.2d 405 (Ct. App. 1996), and the Wisconsin Supreme Court agrees, *see State v. Jennings*, 2002 WI 44, ¶ 3, 252 Wis. 2d 228, 647 N.W.2d 142. Otherwise, the court of appeals has no authority to overrule or modify supreme court decisions under any circumstances. *See Hemberger v. Bitzer*, 216 Wis. 2d 509, 519, 574 N.W.2d 656 (1998). And the court of appeals must not disregard a statement by the supreme court on the ground that it is dictum. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 52–58, 324 Wis. 2d 325, 782 N.W.2d 682. However, the court of appeals is bound only by majority opinions of the supreme court. *See State v. King*, 205 Wis. 2d 81, 88–89, 555 N.W.2d 189 (Ct. App. 1996).

When decisions of the supreme court appear to be inconsistent, the court of appeals follows the most recent decision. *Betthauser v. Medical Protective Co.*, 164 Wis. 2d 343, 350, 474 N.W.2d 783 (Ct. App. 1991), *aff'd*, 172 Wis. 2d 141, 493 N.W.2d 40 (1992). If a published court of appeals decision is in conflict with a Wisconsin Supreme Court decision, the court of appeals must follow the supreme court decision. *Madison Reprographics, Inc. v. Cook's Reprographics, Inc.*, 203 Wis. 2d 226, 238, 552 N.W.2d 440 (Ct. App. 1996). On the other hand, the principle of stare decisis requires the supreme court to follow court of appeals precedent unless compelling reasons exist to overrule it. *AllEnergy Corp. v. Trempealeau Cnty.*, 2017 WI 52, ¶ 55 n.20, 375 Wis. 2d 329, 895 N.W.2d 368.

And although the court of appeals not infrequently strays from its basic function as an error-correcting court and makes law, the court of appeals will sometimes decline to make law if it feels the issue is one more appropriate to the policy and law-making powers of the supreme court. *See, e.g.*, *Hillman v. Columbia Cnty.*, 164 Wis. 2d 376, 396, 474 N.W.2d 913 (Ct. App. 1991). Inasmuch as the court of appeals is, for most appellants, the court of last resort, it is not surprising that its decisions have taken on a law-making function that is greater perhaps than was anticipated when the new court was created. Interestingly, a court of appeals decision, but not a supreme court decision, must be supported by a statement of reasons. *State v. Stuart*, 2003 WI 73, ¶ 28 & n.7, 262 Wis. 2d 620, 664 N.W.2d 82 (citing Wis. Stat. § 752.41(1)). The tensions inherent in a two-tiered appellate system occasionally surface in the decisions of both courts. And while the supreme court has not strictly limited the court of appeals to error correcting, the supreme court has sought to maintain some prerogatives, for example, the power to exercise original jurisdiction and the power of discretionary reversal. *See infra* §§ 2.4, 2.7, 3.24.

Moreover, the court of appeals itself has recognized that, as an error-correcting court, it may not set or establish legal policy. *Aul v. Golden Rule Ins. Co.*, 2007 WI App 165, ¶ 41, 304 Wis. 2d 227, 737 N.W.2d 24. And the court of appeals is not authorized to overrule, even implicitly, its own decisions. *See City of Sheboygan v. Nytsch*, 2008 WI 64, ¶ 5, 310 Wis. 2d 337, 750 N.W.2d 475. Moreover, the court of appeals cannot modify any language from its previous opinions; only the supreme court may do so. *Milwaukee Transp. Servs., Inc. v. Family Dollar Stores of Wis., Inc.*, 2013 WI App 124, ¶ 17, 351 Wis. 2d 170, 840 N.W.2d 132.

In a break with its previous practice, in 2010, the supreme court decided that, once it "overrules" a court of appeals decision, that decision is no longer precedent—even as to matters not specifically overruled—unless the supreme court expressly states that portions of the court of appeals decision are left intact. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶¶ 42, 56, 326 Wis. 2d 729, 786 N.W.2d 78. (An overruling of one court of appeals decision usually occurs in the context of the supreme court's review of a separate court of appeals decision.) As noted in the dissent from the *Blum* majority's holding on overrulings, this applies only to overruled decisions; decisions that are reversed may still be cited as precedential authority with the caveat "reversed on other grounds." *Id.* ¶ 91 (Roggensack, J., concurring in part and dissenting in part). The court of appeals has concluded that the *Blum* rule applies retroactively to court of appeals opinions overruled before *Blum*. *Martine v. Williams*, 2011 WI App 68, ¶ 15, 333 Wis. 2d 203, 799 N.W.2d 449. Thus, cases overruled years before *Blum*, but later cited as authority for legal principles not specifically overruled, are now brought into question.

Recognizing the problem of dealing with pre-*Blum* overrulings, the supreme court has confirmed that *Blum* must be applied retroactively but that "courts may have to interpret cases from this court *that were decided prior to Blum* to determine whether an opinion overruling a court of appeals decision really intended to 'overrule' the entire decision or only a part of it." *State v. Stevens*, 2012 WI 97, ¶ 92, 343 Wis. 2d 157, 819 N.W.2d 798. Pre-*Blum* cases that used no qualifying language "probably intended to overrule the decision in its entirety"; cases with qualifying language "probably intended something less than a total overruling." *Id.* ¶ 93. Supreme court decisions overruling court of appeals cases post-*Blum* presumably will make the scope of the overruling sufficiently clear to eliminate the need for interpretation. Post-*Blum* overrulings will be controlled by a bright-line rule that the entire court of appeals decision is overruled absent an express statement to the contrary. Stated another way, if the supreme court overrules a court of appeals decision "without further comment," the entire court of appeals decision has no precedential value. *Id.* ¶ 80.

In an opinion released before *Stevens*, the court of appeals determined that, as to partially overruled decisions, propositions not specifically overruled could still be cited for persuasive purposes. *Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.*, 2011 WI App 162, ¶ 9, 338 Wis. 2d 144, 807 N.W.2d 697.

Comment. Given the clarifying test set forth in *Stevens*, however, decisions that can be determined to have been partially overruled should be citable as precedent as to the portions not overruled. In any event, citations to a decision overruled in whole or in part should note the overruling and whether the proposition is relied on as precedent or for persuasive purposes only.

IV. Structure of Wisconsin Court of Appeals [§ 1.4]

A. Districts [§ 1.5]

The legislature was vested with significant discretion in the furtherance of its constitutional mandate to create a court of appeals. One of the few constitutional directives was that the legislature combine existing judicial circuits in the state into one or more districts for the new court and designate locations within the districts where the court would sit. Wis. Const. art. VII, § 5.

A special committee on court reorganization considered various redistricting plans and ultimately recommended that the state be divided into four appellate districts. In establishing the district boundaries, the committee considered population density and trends, caseload and number of appeals in the various areas, geographic compactness, travel convenience, and airport facilities. The committee's recommendations were approved by the legislature and incorporated in Wis. Stat. ch. 752.

As required by the Wisconsin Constitution, district boundaries follow the boundaries of judicial circuits. Thus, each district is described at Wis. Stat. § 752.11 by the circuits it contains. The districts were intended to be approximately equal in population and number of appeals. Each district has a statutorily designated chambers location; three districts also have secondary hearing locations. The districts and hearing locations are as follows:

1. District I consists of the judicial circuit for Milwaukee County. Court chambers are located in Milwaukee.

2. District II consists of the judicial circuits for Calumet, Fond du Lac, Green Lake, Kenosha, Manitowoc, Ozaukee, Racine, Sheboygan, Walworth, Washington, Waukesha, and Winnebago Counties. Court chambers are located in Waukesha; the court also sits at Fond du Lac and Racine.

3. District III consists of the judicial circuits for Ashland, Barron, Bayfield, Brown, Buffalo, Burnett, Chippewa, Door, Douglas, Dunn, Eau Claire, Florence, Forest, Iron, Kewaunee, Langlade, Lincoln, Marathon, Marinette, Menominee, Oconto, Oneida, Outagamie, Pepin, Pierce, Polk, Price, Rusk, Sawyer, Shawano, St. Croix, Taylor, Trempealeau, Vilas, and Washburn Counties. Court chambers are located in Wausau; the court also sits at Eau Claire, Superior, and Green Bay.

4. District IV consists of the judicial circuits for Adams, Clark, Columbia, Crawford, Dane, Dodge, Grant, Green, Iowa, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Marquette, Monroe, Portage, Richland, Rock, Sauk, Vernon, Waupaca, Waushara, and Wood Counties. Court chambers are located in Madison; the court also sits at La Crosse and Stevens Point.

Wis. Stat. §§ 752.13, 752.15, 752.17, 752.19.

The chambers and hearing locations identify where the court sits to hear cases. Wis. Stat. § 752.11(2) provides that oral argument in a case must be heard by the court in any city where the court has chambers or where it is specifically required to sit. In addition to these locations, the same statute provides that the supreme court may, by rule, designate other locations for the convenience of litigants, and Wis. Stat. § 752.31 provides that oral arguments and appeals before a single court of appeals judge may be heard by telephone or held in the county in which the case or action originated if a party to the appeal so requests.

Although the court of appeals is divided into four districts, it is not four separate courts. The court has a central administrative office located in Madison. Wis. Stat. § 752.05. The separate hearing locations are provided solely for the convenience of the litigants, *see* Wis. Const. art. VII, § 5, and in all other respects, the structure, administration, and legislative history of the court

emphasize its unified nature. The court functions as a single unit, and its published decisions are binding on its individual districts. *In re Ct. of Appeals*, 82 Wis. 2d 369, 371, 263 N.W.2d 149 (1978).

In an effort to prevent forum shopping between districts, as well as sniping by one district at another, the supreme court has held that the court of appeals has no power to overrule, modify, or withdraw language from one of its published opinions. *See Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). This is consistent not only with the unitary nature of the court of appeals, but also with the idea that the supreme court, rather than the court of appeals, should be the primary source of law development. *Id*. at 189. Recognizing that there may be occasions in which the court of appeals discovers errors in its previous opinions, the supreme court suggests that the way to remedy such defects is for the court of appeals either to certify the appeal to the supreme court or to decide the appeal based on its previous decision while criticizing that decision as erroneous. *Id*. In a case addressing inconsistent court of appeals decisions, the supreme court agreed with the court of appeals that a line of court of appeals cases misinterpreted an earlier court of appeals opinion. The supreme court thus affirmed the result, rejecting the inconsistent cases, but advised that future cases presenting such conflicts should be certified to the supreme court: overruling a court of appeals decision is not an option available to the court of appeals. *Marks v. Houston Cas. Co.*, 2016 WI 53, ¶¶ 79–80, 369 Wis. 2d 547, 881 N.W.2d 309.

The unified nature of the court is also reflected in the rules of appellate procedure. Under these rules, an appeal or other type of review is not taken to the appellate district, but to the court of appeals. Wis. Stat. § 808.03. The appeal is conducted through a single clerk of court office. Any document required to be filed by traditional means under the rules of appellate procedure must be filed with the clerk of court in Madison, Wis. Stat. § 809.80(1), unless a different place of filing is expressly required or permitted by statute or rule. *Cf.* Wis. Stat. § 809.801 (describing appellate electronic filing system). See sections 18.3 and 18.4, *infra*, for the basic procedures for traditional (paper) filing and electronic filing.

B. Venue
[§ 1.6]

The four appellate districts of the court of appeals are used to determine venue. With the exception of appeals in which the sole defendant below was the state or an agent of the state, the statutes provide that a judgment or order appealed to the court of appeals must be heard in the court of appeals district that contains the court from which the judgment or order is appealed. Wis. Stat. § 752.21(1). In appeals in which the sole defendant below was the state or an agent of the state, the appellant may choose to decide the matter any district of the court of appeals other than the district that contains the court from which the order or judgment is appealed. Wis. Stat. § 752.21(2). All appeals and other proceedings taken to the court of appeals are routinely assigned by the clerk of court to the appellate district in which the court appealed from is located, unless the appeal is heard in another district selected by the appellant pursuant to Wis. Stat. § 752.21(2). In cases under Wis. Stat. § 752.21(2), the supreme court has granted supervisory relief when the court of appeals improperly venued the matter in a district other than the one selected by the appellant. *State ex rel. DNR v. Wisconsin Ct. of Appeals*, 2018 WI 25, 380 Wis. 2d 354, 909 N.W.2d 114.

Comment and Practice Tip. Note that the provisions of Wis. Stat. § 752.21(2) do not provide how or when the selection is to be made. An appropriate practice would be to make the selection in the notice of appeal. Recognizing this omission, the court of appeals now includes in its notice to the parties acknowledging the filing of the notice of appeal that, if the matter is one under Wis. Stat. § 752.21(2), the appellant must make any venue selection within 14 days or the appeal will be venued in the district from which the case arose.

Technically, however, the statutes do not seem to require that *all* matters be assigned to the district in which the circuit court is located. Wis. Stat. § 752.21 says only that those matters to be *heard* by the court must be so assigned. The 1981 Judicial Council Committee note to Wis. Stat. § 809.41 indicates that a case is heard if there is oral argument but is "decided" if submitted on the briefs without oral argument. If a case is submitted on both briefs and oral argument, and is therefore heard, Wis. Stat. § 752.21(1) requires that the argument take place in the district in which the circuit court is located (or, in case of an appeal under Wis. Stat. § 752.21(2), in the district designated by the appellant). If the case is submitted only on the briefs, however, there apparently is no requirement that the case be assigned to a particular district.

Although additional support beyond the Judicial Council Committee note can be marshalled for this interpretation, it is contrary to the actual practice of the court of appeals and is of little practical importance to appellate attorneys. With the exception of cases under Wis. Stat. § 752.21(2), attorneys have no real role in determining venue because all documents are filed in the clerk's office in

Madison (by mail or through the electronic filing system), which routinely assigns matters to the districts from which they originated. Furthermore, the court never transfers cases from one district to another. If any caseload equalization is necessary among districts, judges (not cases) are transferred; this policy results from the court's position that venue rests in the district from which the case arose.

Usually there is no difficulty determining the district to which an appeal will be assigned. Even when there has been a change of circuit court venue from a circuit court in one appeals district to a circuit court in another district, the proper appellate venue is easily identified. If the change in circuit court venue only changed the location of the trial, an appeal governed by Wis. Stat. § 752.21(1) will be to the appellate district in which the case originated. If the circuit court venue was transferred from one court to another, the appeal in a case under Wis. Stat. § 752.21(1) will be to the district containing the circuit court to which the case was transferred.

C. Judges [§ 1.7]

The Wisconsin Constitution left it to the legislature to determine the number of judges for the court of appeals, although the constitution did prescribe that the judges serve six-year terms and reside in the district from which elected. Wis. Const. art. VII, § 5(2). The legislature concluded that there should at first be 12 judges, with 3 judges being elected in each of the 4 court of appeals districts. Wis. Stat. § 752.03 (1977). The elections are by district on an at-large basis, and only 1 court of appeals judge may be elected in a district in any given year. Wis. Stat. § 752.04.

The size of the court of appeals has been increased from 12 to 16 judges. Four judges serve in Districts I and II, and five judges serve in District IV to meet the backlog problems of those districts. Wis. Stat. § 752.03. District III still consists of three judges.

Pursuant to Wis. Stat. § 752.31, the judges sit in three-judge panels or as single judges, depending on the type of case. This remains true in Districts II and IV, even with the additional judges. Rotating panels of three judges will be selected from the judges in those districts. There is no provision for decisions or hearings en banc. The three-judge panels are usually composed of the judges elected in a district. Neither the constitution nor the legislature has expressly prescribed, however, that a judge must sit on the panel in the district in which elected or that a judge must remain on a particular panel for an entire term. Nonetheless, whatever the ambiguities of the law, the practice of the court has been for judges to sit on the panel in the district from which they were elected.

Permanent vacancies on the court of appeals are filled by appointment. The governor's power to make appointments to the court is granted by Wis. Const. art. VII, § 9. An appointed judge serves until a successor is elected. Election of a permanent successor occurs in the spring election of the first calendar year after the vacancy occurs, unless another court of appeals judge is to be elected in that district at that time. *See* Wis. Stat. § 752.04. An appointed judge could serve several years before an election takes place.

Temporary vacancies are also filled by appointment. A temporary vacancy can arise, for example, if the supreme court determines that a judge has a temporary disability. The chief justice of the supreme court may fill temporary vacancies by appointing a retired or reserve judge or justice of a court of record or the supreme court to the position. Wis. Const. art. VII, § 24(3). The temporary judge assumes the duties of the office until the disability ends or the term finishes, whichever occurs first.

A court of appeals judge, whether elected or appointed, serves on the panel in a particular district and, except while assigned to another district, remains on that panel for the duration for his or her term. Assignments should be distinguished from appointments. An appointment may be made when there is a vacancy on the bench; an assignment may be made when there is no vacancy. For example, a judge may be unavailable because of illness, vacation, disqualification, or similar reason, with the result that the district has an insufficient number of judges to constitute a three-judge panel. Assigning a reserve judge or an appeals judge from another district may be an effective solution. Such assignments are often called *substitutions*.

Assignments may be made by the chief justice of the supreme court pursuant to Wis. Const. art. VII, § 4(3). The statutory counterpart to this provision, Wis. Stat. § 751.03, permits the chief justice to assign reserve judges as well as active judges to serve temporarily in the court of appeals. By exercising this authority, the chief justice may even increase the size of the court of appeals to more than 16 judges, which is the number provided under Wis. Stat. § 752.03. Moreover, the chief justice may make an assignment for any reason, provided it is for the purpose of aiding the court in the disposition of judicial business. For example, an excessive caseload pending before the court of appeals may justify temporarily assigning one or more additional judges; this has occurred a number of times since the court of appeals commenced operations, most notably in District IV, where reserve judges have

been assigned to help alleviate that district's backlog problems. It has been uncommon, however, since the size of the court was increased to 16 judges, from 15 judges, on August 1, 1994.

Wis. Stat. § 752.07 directs the supreme court to appoint a chief judge for the court of appeals for a three-year term. (The supreme court's internal operating procedures provide that the chief judge for the court of appeals "is subject to removal by the supreme court and may not serve more than 2 consecutive terms," absent "exceptional circumstances." *See infra* ch. 27.) In addition to handling his or her own cases, the chief judge is responsible for administering the entire court of appeals. The chief judge appoints a presiding judge in each district to preside at panel hearings and conferences, to act as spokesperson for the panel, to decide certain motions, and to perform any necessary administrative functions. The chief judge presides at public ceremonies and hearings where he or she is a member of the panel.

The chief judge is provided with an administrative assistant. In addition, all judges are allowed a secretary and a law clerk.

An important feature of the organizational structure of the court of appeals is the central clerk's office and the central staff of attorneys. Although the legislature required the administrative headquarters of the court of appeals to be in Madison, thus emphasizing the unified nature of the court, there was some question about whether the individual districts should have their own clerk's offices and clerical staff. The supreme court decided that such decentralization would be inimical to the concept of a single court of appeals, whereas having one clerk's office located in Madison would promote uniformity in procedures and practices.

A single clerk's office also prevents duplication of functions and guards against overstaffing or understaffing of an individual district. Additionally, the court records are easily accessible should supreme court review be invoked. This is even truer since the supreme court decided to merge its clerk's office with the clerk's office of the court of appeals. The clerk of the court of appeals is now also the clerk of the supreme court.

To further promote the unified nature of the court of appeals, the supreme court concluded that most of the staff attorneys assigned to each district should work in Madison. Staff attorneys, not to be confused with the judges' individual law clerks, provide a unifying influence on the court of appeals by consulting with one another and keeping informed about how the various panels decide cases and apply court procedures. The central staff attorneys' office, like the central clerk's office, thus serves the important function of discouraging the four districts of the court from going their separate ways.

As the court of appeals' caseload has grown, so has the number of its staff attorneys. While the majority of the staff attorneys continue to be centrally located in Madison, each district now has at least one resident staff attorney.

Further information about the organization, personnel, and decision-making process of the court of appeals can be found in the court's internal operating procedures, which are reprinted in chapter 21, *infra*.

V. Structure of Wisconsin Supreme Court [§ 1.8]

The basic organization of the Wisconsin Supreme Court remained unaffected by the court reorganization of 1978. The supreme court consists of one court of seven justices who sit in Madison. Wis. Const. art. VII, § 4(1). A majority of justices serving on the court elect the chief justice, who serves a two-year term. Wis. Const. art. VII, § 4(2).

The justices are elected for 10-year terms in a statewide election. Wis. Const. art. VII, § 4(1). Only one justice may be elected in any year. *Id*. There is no provision for the assignment or appointment of temporary justices in the event of disqualification or illness. A motion to recuse an individual justice is decided solely by the justice to whom the motion is addressed; there is no authority for a majority of the court to disqualify a peer on a case-by-case basis. *State v. Henley*, 2011 WI 67, ¶ 39, 338 Wis. 2d 610, 802 N.W.2d 175.

A significant factor in the 1978 court reorganization was its recognition of the growth in the Wisconsin court system and the need for greater order in the administration of that system. The chief justice is recognized as the administrative head of the judicial system and is authorized to exercise his or her authority pursuant to procedures adopted by the supreme court. Wis. Const. art. VII, § 4(3). Not coincidentally, the years since 1978 have witnessed a significant expansion of the bureaucracy needed to support a modern court system.

The role of the chief justice has also become more demanding as the growing administrative responsibilities and public demands on the head of the court system must be balanced against the purely judicial duties that still must be performed. Although the chief justice works closely with the director of state courts and has an assistant in addition to the law clerk and secretary allowed all the justices, the administrative duties of the office of chief justice present a serious burden, because the justice who holds the position becomes a high-level executive administering an independent branch of state government.

The staff of the supreme court includes the office of the supreme court clerk, a marshal, the state law librarian, and a staff of attorneys known as supreme court commissioners. The director of state courts, under the direction of the chief justice and the supreme court, administers a wide range of offices essential to running the statewide court system. The organization of the supreme court, its personnel, and decision-making process are considered in more detail in the court's internal operating procedures, which are reprinted in chapter 27, *infra*.

Finally, it should be noted that a number of agencies operate under the aegis of the supreme court. The most important of these are the Office of Lawyer Regulation and the Board of Bar Examiners. A discussion of the operations and procedures of these agencies is beyond the scope of a general practice book on appellate procedure. Information about the agencies can be found in the *Wisconsin Blue Book* or on the Wisconsin Court System's website, *see Administrative Offices of the Supreme Court & Director of State Courts*, https://www.wicourts.gov/courts/offices/index.htm (last updated Sept. 7, 2021), and their operating procedures are set forth in the Wisconsin Supreme Court Rules. *See* SCR ch. 21; SCR ch. 22; SCR ch. 31.

Supplement Chapter 2
Jurisdiction of theWisconsin Appellate Courts

Book section supplemented: 2.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

2.1 Scope

Pages 1–2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 2
Jurisdiction of the Wisconsin Appellate Courts

I. Scope
[§ 2.1]

This chapter highlights the jurisdiction of both the court of appeals and the supreme court. The appellate, original, and supervisory jurisdictions of these courts are discussed. The *procedures* for invoking jurisdiction (for example, how to file an appeal

or petition for review) are considered in chapters 4–10, *infra*, for the court of appeals and in chapters 22–26, *infra*, for the supreme court. This chapter also discusses the circuit court's authority to act pending appeal. [1]

II. Wisconsin Court of Appeals [§ 2.2]

A. Appellate Jurisdiction [§ 2.3]

The Wisconsin Constitution states that the court of appeals "shall have such appellate jurisdiction … as the legislature may provide by law." Wis. Const. art. VII, § 5(3). In Wis. Stat. § 808.03, the legislature provided for two types of appellate jurisdiction: mandatory and discretionary.

Mandatory appellate jurisdiction occurs by appeal from a final order or judgment entered in an action or special proceeding. This type of jurisdiction is termed mandatory because the orders or judgments appealed from are appealable as of right. Wis. Stat. § 808.03(1).

Although Wis. Const. art. I, § 21(1), also guarantees a writ of error as of right, and Wis. Stat. § 808.02 authorizes the court of appeals to review by writ of error, there is no statutory procedure for review by writ of error. An appeal is defined at Wis. Stat. §§ 808.01 and 809.01 as a review in an appellate court by appeal or writ of error; thus, the concept of writ of error has apparently been merged for all practical purposes with that of review by appeal as a matter of right.

The grant in Wis. Stat. § 808.03(1) of mandatory appellate jurisdiction is the essence of the reorganized court system: only final orders and judgments may be appealed as of right, and the appeal is to the intermediate court of appeals, not the supreme court. Furthermore, final orders and judgments that formerly were appealed from the now defunct county courts to the circuit courts now are appealed from the circuit court to the court of appeals. *See supra* § 1.2. (Appeals from municipal courts and administrative agencies are taken initially to the circuit court.)

One exception to the rule that all final orders and judgments are appealable to the court of appeals exists in congressional or state legislative-redistricting cases. In those cases, an appeal may be heard by the supreme court, not by the court of appeals. Wis. Stat. § 751.035(3).

The second type of appellate jurisdiction of the court of appeals—discretionary jurisdiction—represents another important factor in the 1978 court reorganization. Wis. Stat. § 808.03(2) allows an appeal, with permission of the court of appeals, from any judgment or order not appealable as of right. This discretionary jurisdiction to consider nonfinal orders and judgments replaced the exceptions in the prior procedure that allowed appeals as of right from many types of nonfinal orders and judgments.

With three very limited exceptions—(1) orders suspending or restraining enforcement of a state statute, (2) certification or decertification orders entered in class actions, and (3) orders related to an electronics and information technology manufacturing zone, *see infra* § 4.4—appellate jurisdiction in Wisconsin is now doctrinally pure. Only final orders and judgments may be appealed as of right; all other orders and judgments are reviewable at the discretion of the court. Appeals as of right are discussed in detail in chapters 4 and 5, *infra*. Discretionary or permissive appeals are discussed in chapter 9, *infra*.

B. Supervisory and Original Jurisdiction [§ 2.4]

In addition to appellate jurisdiction, Wisconsin's constitution and statutes vest the court of appeals with original and supervisory jurisdiction. Wis. Const. art. VII, § 5(3); Wis. Stat. §§ 752.01, 752.02. The grant of supervisory jurisdiction is well settled. On the other hand, the nature and extent of the original jurisdiction of the court of appeals have been subject to some dispute.

Supervisory jurisdiction of the court of appeals extends to all actions and proceedings in all courts except the supreme court. Wis. Stat. § 752.02. Often called *superintending control*, it is an independent and separate jurisdiction enabling and requiring the court of appeals, on sufficient notice, to "promptly restrain the excesses and quicken the neglects" of lower courts in the absence of another adequate remedy. *See State v. Kendall*, 94 Wis. 2d 63, 67 n.8, 287 N.W.2d 758 (1980) (citing *State ex rel. Fourth Nat'l Bank v. Johnson*, 103 Wis. 591, 618, 79 N.W. 1081 (1899)). Writs such as mandamus and prohibition are employed to invoke the court of appeals' supervisory jurisdiction, and the court is authorized to issue such writs in the aid of its jurisdiction. Wis. Stat. § 752.01(3).

The requirements for such writs and the procedure for invoking the court's supervisory jurisdiction are detailed in chapter 10, *infra*. While the original jurisdiction of the court of appeals ordinarily does not extend to the administrative duties of the circuit court, the court of appeals does have authority to review, by petition for supervisory relief, the decision of a chief judge of a judicial administrative district denying a request for substitution of judge. *State ex rel. James L.J. v. Walworth Cnty. Cir. Ct.*, 200 Wis. 2d 496, 505, 546 N.W.2d 460 (1996), *overruling State ex rel. Gilboy v. Circuit Ct. for Waukesha Cnty.*, 119 Wis. 2d 27, 349 N.W.2d 712 (Ct. App. 1984). In contrast, the court of appeals has no authority to review the method administratively used by a chief judge to select a substitute judge. *See Petitioner v. Evans*, 2018 WI App 53, ¶ 16, 383 Wis. 2d 669, 917 N.W.2d 218.

The superintending authority of the court of appeals is narrower than that of the supreme court and does not authorize the court of appeals to expand rules established by the supreme court pursuant to the supreme court's superintending authority. *State v. Kramer*, 2006 WI App 133, ¶ 17, 294 Wis. 2d 780, 720 N.W.2d 459.

The original jurisdiction of the court of appeals is expressly limited to issuing prerogative writs. Wis. Const. art. VII, § 5(3); Wis. Stat. § 752.01(2). The prerogative writs are those, such as mandamus and prohibition, that are also used to aid the court of appeals in its exercise of supervisory jurisdiction. Thus, it can be argued that the original jurisdiction of the court of appeals extends only to the use of writs when there is a gap in the court's supervisory authority. Because the latter authority is only addressed to the actions and proceedings of courts, the use of writs against nonjudicial bodies (such as administrative agencies or a sheriff's office) can be considered prerogative writs based on original, rather than supervisory, jurisdiction. *See* Robert J. Martineau & Richard R. Malmgren, *Wisconsin Appellate Practice* 18 (1978).

The Wisconsin Court of Appeals has no *publici juris* original jurisdiction, i.e., original jurisdiction over matters that are of great public importance. *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 394 N.W.2d 732 (1986). The court of appeals' original jurisdiction is limited to cases in which it already has appellate or supervisory jurisdiction. *Id*. at 97. As a result, it is questionable whether the court of appeals' original jurisdiction is meaningful or of use to an appellate attorney.

Note, however, that *Swan* does not prohibit the court of appeals from hearing matters simply because they may be *publici juris*. *State ex rel. Journal/Sentinel, Inc. v. Jennings*, 141 Wis. 2d 618, 415 N.W.2d 518 (1987). Rather, *Swan* simply precludes the court of appeals from hearing an original action solely on *publici juris* grounds. The court of appeals may consider *publici juris* matters in the exercise of its appellate or supervisory jurisdiction. *Id*.

III. Wisconsin Supreme Court [§ 2.5]

A. Appellate Jurisdiction [§ 2.6]

Consistent with the scheme of the two-tiered appellate court system, the Wisconsin Supreme Court has no mandatory appellate jurisdiction. Appeals as of right go to the court of appeals, which is primarily charged with an error-correction function. The supreme court has the discretion to review those cases it deems important from a law-development standpoint. This discretionary appellate jurisdiction of the supreme court takes two forms.

The first, and by far the most common, manner of achieving appellate review in the supreme court is by petition to review a final decision of the court of appeals. Wis. Stat. § 808.10. Petitions to review are discussed in chapter 23, *infra*.

The second method of obtaining appellate review allows the supreme court to bypass the court of appeals by taking jurisdiction of an appeal or other proceeding pending in the court of appeals. Wis. Stat. § 808.05. There are three methods of bypass, with the response to each being within the discretion of the supreme court. First, a party may petition the supreme court for bypass. Second, the court of appeals may certify the matter to the supreme court. Third, the supreme court may grant review on its own motion. Bypass procedures are discussed in chapter 24, *infra*.

The appellate jurisdiction of the supreme court is all encompassing, covering all Wisconsin courts. *See Leavitt v. Beverly Enters., Inc.*, 2010 WI 71, ¶ 46, 326 Wis. 2d 421, 784 N.W.2d 683. Although the court has established a policy of declining review in certain types of cases, it does so as a matter of practice, not because it has no jurisdiction. *Id*. ¶¶ 45–47.

B. Supervisory and Original Jurisdiction [§ 2.7]

The supervisory authority of the supreme court rests on its superintending and administrative control of the entire state court system. Wis. Const. art. VII, § 3(1); Wis. Stat. §§ 751.07, 751.08. This includes the authority to issue any writs necessary in aid of the court's jurisdiction. Wis. Const. art. VII, § 3(2). In both theory and practice, the supreme court's supervisory authority is rarely invoked, because the court of appeals is ordinarily the forum for parties seeking supervisory relief. A remedy by petition for review is available after the court of appeals has acted.

The superintending authority of the supreme court is, however, broader than the supervisory authority of the court of appeals. In contrasting the differing nature of supervisory relief (writs) in the two appellate courts, the supreme court has described the term *supervisory writ* as both (1) the general term used in petitioning the court of appeals or the supreme court to exercise their constitutional supervisory authority, and (2) a new writ the supreme court devised independent of traditional common-law writs. *State ex rel. CityDeck Landing LLC v. Circuit Ct. for Brown Cnty.*, 2019 WI 15, ¶ 26, 385 Wis. 2d 516, 922 N.W.2d 832. The supreme court's superintending authority is unlimited and indefinite; whether to invoke it is not a question of power but a question of judicial policy. *See State v. Jerrell C.J. (In the Int. of Jerrell C.J.)*, 2005 WI 105, ¶¶ 40–41, 283 Wis. 2d 145, 699 N.W.2d 110. And the failure of a party to seek supervisory relief first in the court of appeals, which is a prerequisite to seeking supervisory relief in the supreme court pursuant to Wis. Stat. § 809.71, is not a bar to seeking or obtaining relief in the supreme court based on the supreme court's broader powers of superintending jurisdiction if the supreme court deems that the exercise of that power is compelled by the necessities of justice. *See State ex rel. Universal Processing Servs. of Wis., LLC v. Circuit Ct. of Milwaukee Cnty.*, 2017 WI 26, ¶¶ 45–50, 374 Wis. 2d 26, 892 N.W.2d 267.

As with the court of appeals, the supreme court has a constitutional grant of original jurisdiction. Wis. Const. art. VII, § 3(2). Unlike the court of appeals, however, the original jurisdiction of the supreme court is not limited to issuing prerogative writs such as mandamus or prohibition. Consequently, the supreme court, but not the court of appeals, may make factual findings in the exercise of its original jurisdiction. *See Gottsacker v. Monier*, 2005 WI 69, ¶ 35, 281 Wis. 2d 361, 697 N.W.2d 436. Perhaps the most important aspect of the original jurisdiction in the supreme court is the court's authority to hear matters that are of great public importance, or *publici juris*.

Comment. The concept of original jurisdiction and its relation to supervisory jurisdiction are the subject of a confusing, older opinion, *Petition of Heil*, 230 Wis. 428, 284 N.W. 42 (1939), which, despite its age, continues to be cited frequently as support for the supreme court's broad authority. *See, e.g.*, *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶ 17, 351 Wis. 2d 237, 893 N.W.2d 388.

For a discussion of the procedures employed when seeking original or supervisory jurisdiction, see chapters 25 and 26, *infra*.

IV. Other Types of Jurisdiction [§ 2.8]

There are other types of supreme court jurisdiction in addition to those discussed above. These are jurisdiction to regulate judges and attorneys, jurisdiction to regulate pleading and practice, and jurisdiction to administer the court system. Although some of these types of jurisdiction are now recognized in the constitution, all of them are based on the supreme court's inherent authority over the administration of the court system, the procedures used in that system, and the judges and lawyers involved in the system. *See* Martineau & Malmgren, *supra* § 2.4, at 227–28. These inherent powers derive from the doctrine of separation of powers and allow the judiciary to take action necessary to preserve its role as a coequal branch of government. *State v. Schwind*, 2019 WI 48, ¶ 14, 386 Wis. 2d 526, 926 N.W.2d 742. Among the instances in which courts may invoke their inherent powers are those concerning (1) the courts' internal operations, ensuring that there are adequate facilities and personnel to carry out the courts' business; (2) the discipline of attorneys and judges; and (3) the effective functioning of the courts and the fair administration of justice, such as by holding persons in contempt and correcting clerical errors at any time. *Id.* ¶¶ 16–19. The supreme court jealously guards its exclusive jurisdiction in these areas. *See Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶¶ 1, 2, 36, 376 Wis. 2d 147, 897 N.W.2d 384 (declaring unconstitutional legislation creating an extrajudicial Crime Victims Rights Board with powers to impose sanctions on judges). The supreme court also has used this inherent authority to grant review when review has been improperly sought, but review would clarify procedures or implement or create procedural rules not specifically required by law. *See State ex rel. Off. of State Pub. Defender v. Court of Appeals (In re State v. Buchanan)*, 2013 WI 31, ¶ 18, 346 Wis. 2d 735, 828 N.W.2d 847 (declaring rights and granting relief notwithstanding absence of grounds for supervisory relief as requested).

V. Circuit Court Jurisdiction Pending Appeal [§ 2.9]

A circuit court in a civil appeal retains authority to act on all issues in the case until the record is filed in the appellate court. Wis. Stat. § 808.075(3). A circuit court in a criminal appeal (or another appeal initiated under Wis. Stat. § 809.30, *see infra* ch. 19) retains authority to act on all issues—except a motion to extend a time limit specified in Wis. Stat. § 809.30—until the filing of the notice of appeal. Wis. Stat. § 808.075(2). After that, the circuit court possesses only those specific powers authorized by Wis. Stat. § 808.075(1) and (4).

The limitation to powers authorized by Wis. Stat. § 808.075(1) and (4) comports with the rule that a circuit court is competent to act pending appeal only upon statutory authority. *See Hengel v. Hengel*, 120 Wis. 2d 522, 524–25, 355 N.W.2d 846 (Ct. App. 1984). While it appears that the powers enumerated in Wis. Stat. § 808.075 are intended to be a complete and exclusive list, the Wisconsin Supreme Court has resurrected case law that states the circuit court also has competency to act on "'certain trivial and unsubstantial matters'" pending appeal. *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶ 18, 351 Wis. 2d 237, 839 N.W.2d 388 (quoting *Mayer v. Mayer (In re Est. of Mayer)*, 29 Wis. 2d 497, 505, 139 N.W.2d 111 (1966)).

Among the most common circuit court actions allowed pending appeal are (1) hearing and deciding a motion for relief pending appeal pursuant to Wis. Stat. § 809.12, and (2) hearing and deciding a motion for relief from judgment pursuant to Wis. Stat. § 806.07. *See* Wis. Stat. § 808.075(1).

Note. Although not specifically provided in Wis. Stat. § 808.075, a circuit court pending appeal may take steps necessary to execute or enforce a judgment. Otherwise, the provision of Wis. Stat. § 808.07(1) that there is no automatic stay of execution or enforcement would be nullified. Thus, a circuit court may confirm a sheriff's sale notwithstanding an appeal from the underlying foreclosure judgment. *See Community Nat'l Bank v. O'Neill*, 157 Wis. 2d 244, 247–49, 458 N.W.2d 385 (Ct. App. 1990). Moreover, it is arguable that there is statutory authority for the circuit court to enforce its orders and judgments pending appeal. See Wis. Stat. § 808.075(1), referring to Wis. Stat. § 808.07(2), which provides the somewhat unclear statement that a circuit court may make any order pending appeal "appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered."

Comment. The decision in *Madison Teachers, Inc.*, vacating a contempt order entered pending appeal, should be construed narrowly. It is based on the superintending authority of the supreme court, not on a finding that the circuit court had no competence or jurisdiction to enforce its judgment pending appeal. *Madison Teachers, Inc.*, 2013 WI 91, ¶ 21, 351 Wis. 2d 237. It should not be viewed to undercut the necessary authority of the circuit courts to enforce or execute orders and judgments pending appeal.

Wis. Stat. § 808.075 does not change or extend the time limits for acting as set forth in the specific statutes cited in that section. *Schmidt v. Smith*, 162 Wis. 2d 363, 370, 469 N.W.2d 855 (Ct. App. 1991). Although a circuit court, pending appeal and on its own motion, may grant a new trial in the interests of justice, it must do so within the time limits governing a motion for new trial by a party. *Id*. at 368–69.

Supplement Chapter 3
Standards of Review and the Decision to Appeal

Book sections supplemented: 3.1, 3.4, 3.6, 3.21, and 3.22

Book section replaced: 3.8

3.1 Scope

Page 2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

3.4 [Circuit Court Record—Avoiding Waiver or Forfeiture] Raising Issues in the Circuit Court

Page 5: Added textual sentence and Great Lakes *citation after* Hoida *citation in fifth paragraph in section*

Consistent with the general refusal of the appellate courts to consider issues not raised at all in the circuit court, an appellate court may choose to decline review of issues that were not *properly* raised in the circuit court. *See Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶ 18 n.11, 291 Wis. 2d 283, 717 N.W.2d 17 (refusing to review issue raised in circuit court when circuit court declined to review that issue because it was not pleaded and therefore not properly before the circuit court). Moreover, the appellate court might decline to review an issue that was raised below if that issue was not "fully developed" or "adequately argued" in the circuit court. *See Great Lakes Excavating, Inc. v. Dollar Tree Stores, Inc.*, 2021 WI App 23, ¶ 25, 397 Wis. 2d 210, 959 N.W.2d 351, *rev'd on other grounds*, 2022 WI 44, ¶ 22, 402 Wis. 2d 311, 976 N.W.2d 506. Failure to raise an issue in the court of appeals forfeits the right to raise it in the supreme court even though it was raised in the circuit court. *Veritas Steel, LLC v. Lunda Constr. Co.*, 2020 WI 3, ¶¶ 40, 42, 389 Wis. 2d 722, 937 N.W.2d 19.

Page 6: Added Note *before last paragraph in section*

Note. Arbitration proceedings do not follow the procedures applicable in the circuit court. Therefore, a failure to contemporaneously object or raise an issue in arbitration does not effect a forfeiture so long as the objection is raised before issuance of the arbitral award. *See Loren Imhoff Homebuilder, Inc. v. Taylor*, 2022 WI 12, ¶¶ 11, 19, 24, 400 Wis. 2d 611, 970 N.W.2d 831.

3.6 [Circuit Court Record—Avoiding Waiver or Forfeiture] Other Types of Waiver

Page 8: Added textual sentence and Beyer *citation after* Racine County *citation in first paragraph in section*

Attorneys should recognize other waivers that go directly to the right to appeal. Perhaps the clearest is the rule that a plea of guilty or no contest constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See State v. Princess Cinema*, 96 Wis. 2d 646, 651, 292 N.W.2d 807 (1980) (no-contest plea); *State ex rel. Harris v. Milwaukee City Fire & Police Comm'n*, 2012 WI App 23, ¶ 11, 339 Wis. 2d 434, 810 N.W.2d 488 (guilty plea). *But see State v. Wilcenski*, 2013 WI App 21, ¶ 2 n.2, 346 Wis. 2d 145, 827 N.W.2d 642 (holding that guilty plea was not a waiver when plea occurred after denial of a petition for leave to appeal). This rule has been extended from criminal cases to cover pleas in civil forfeiture actions. *See Racine Cnty. v. Smith*, 122 Wis. 2d 431, 362 N.W.2d 439 (Ct. App. 1984). Defendants have tried, and failed, to avoid the guilty-plea-waiver rule by stipulating to all facts and agreeing that the court may make a finding of guilt, but not pleading guilty. *See State v. Beyer*, 2021 WI 59, ¶¶ 6, 24–25, 29, 397 Wis. 2d 616, 960 N.W.2d 408 (holding that stipulated facts and findings of guilt do not constitute a trial or a guilty plea and are invalid as a matter of law). Like an escape by a criminal defendant, an absconding by a juvenile from a residential treatment center has been held to effect a forfeiture of the right to appeal or seek postconviction relief. *State v. Lamontae D.M. (In the Int. of Lamontae D.M.)*, 223 Wis. 2d 503, 507–10, 589 N.W.2d 415 (Ct. App. 1998). The supreme court applied the same principle in dismissing a petition for review when the petitioner absconded from supervision on parole after the court initially granted review. *State v. Townsend*, 2007 WI 31, ¶¶ 1–2, 299 Wis. 2d 672, 728 N.W.2d 342.

Page 9: Added Roberts Premier Design *citation after* Sanders *citation in third paragraph in section*

Closely related to waiver by plea is the concept that one may waive the right to appeal by causing or inducing a judgment or order to be entered or by consenting or stipulating to entry of judgment. *Racine Cnty.*, 122 Wis. 2d at 437. Stated another way, a defendant who actively contributes to a circuit court action is estopped from claiming on appeal that the action was an error. *State v. Darcy N.K.*, 218 Wis. 2d 640, 649, 581 N.W.2d 567 (Ct. App. 1998). Similarly, a party cannot appeal from an order if that party

could have participated in the circuit court proceedings but chose not to. *In re Ambac Assurance Corp.*, 2012 WI 22, ¶ 36, 339 Wis. 2d 48, 810 N.W.2d 450. As explained in one decision, when a party has invited circuit court error, that party is estopped from later complaining on appeal. *State v. Freymiller (In re Support of C.L.F.)*, 2007 WI App 6, ¶ 15, 298 Wis. 2d 333, 727 N.W.2d 334. In such cases, however, the appellate court has discretion to disregard the waiver and address the merits if it so chooses. *Id.* ¶ 17. A party who stipulates to the entry of a judgment cannot condition that judgment on the outcome of a subsequent appeal. *See Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 569 N.W.2d 45 (Ct. App. 1997). In such circumstances, the appeal will be dismissed, leaving the parties bound by their stipulated judgment. In some cases, waiver may also result from accepting the benefits of a judgment or complying with a judgment. *See Riley v. Lawson*, 210 Wis. 2d 478, 488, 565 N.W.2d 266 (Ct. App. 1997). Stipulating to a final order while reserving the right to appeal is not, however, a waiver of the right to appeal when the stipulation expressly states that it is not a waiver of appeal rights. *See Sanders v. Estate of Sanders (In re Est. of Sanders)*, 2008 WI 63, ¶ 37, 310 Wis. 2d 175, 750 N.W.2d 806; *see also Roberts Premier Design Corp. v. Adams*, 2021 WI App 52, ¶ 23, 399 Wis. 2d 151, 963 N.W.2d 796 (advising parties settling cases through consent judgments to state expressly whether appeal rights are intended to be preserved) (review denied). Conversely, a stipulation expressly waiving the right to appeal will be upheld. *See Ceria M. Travis Acad., Inc. v. Evers*, 2016 WI App 86, ¶¶ 23–26, 372 Wis. 2d 423, 887 N.W.2d 904 (upholding waiver of Wis. Stat. ch. 227 review rights). The stipulated waiver must be clear and "not made out by way of inference." *Id.* ¶ 26 (citing *Dillon v. Dillon*, 244 Wis. 122, 130, 11 N.W.2d 628 (1943)). In an appeal against several parties, settling the appeal against some adverse parties does not waive the right to continue the appeal against a remaining party. *Grigg v. Aarrowcast*, 2018 WI App 17, ¶¶ 73–77, 380 Wis. 2d 464, 909 NW 2d 183.

3.8 [Circuit Court Record—Avoiding Waiver or Forfeiture] [Exceptions to Waiver Rule] Constitutional Issues and Plain Error

Page 10: Replaced section

When will an appellate court exercise its discretion and review a waived issue? The two most common exceptions to the general waiver rule are when allegations of either constitutional issues or plain error are involved. The court will consider a constitutional issue raised for the first time on appeal if it is in the best interest of justice to do so, if both parties have had an opportunity to brief the issue, and if there are no factual issues that must be resolved. *See, e.g.*, *L.K. v. B.B. (In the Int. of Baby Girl K.)*, 113 Wis. 2d 429, 448, 335 N.W.2d 846 (1983). *But see State v. Marshall*, 113 Wis. 2d 643, 653–54, 335 N.W.2d 612 (1983). Constitutional issues generally are not deemed waived unless there is an express waiver; constitutional rights cannot be "forfeited" by mere failure to object. *See State v. Saunders*, 2011 WI App 156, ¶ 29 n.5, 338 Wis. 2d 160, 807 N.W.2d 679 (holding that failure to notify trial court of sleeping juror constituted forfeiture of right to raise issue because issue was one of juror misconduct, not one of constitutional right to trial by jury). Plain errors are errors that are so plain or so fundamental as to affect the appellant's substantial rights. Wis. Stat. §§ 901.03(4), 805.18(2); *State v. Sonnenberg*, 117 Wis. 2d 159, 176–77, 344 N.W.2d 95 (1984); *see also State v. Arrington*, 2022 WI 53, ¶ 32, 402 Wis. 2d 675, 976 N.W.2d 453 (explaining that, for appellate court to apply plain-error doctrine, error must be "obvious and substantial" and require relief even though not objected to at trial), *cert. denied*, 143 S. Ct. 411 (2022). Although review of waived plain errors is generally granted, it is discretionary. *State v. Paulson*, 106 Wis. 2d 96, 104–05, 315 N.W.2d 350 (1982). It is the defendant's burden to show plain error. *Id.* at 106. Waiver may be found even if it is clear that, but for the waiver, the error would entitle the defendant to a new trial. *State v. Erickson*, 227 Wis. 2d 758, 767, 596 N.W.2d 749 (1999).

3.21 Negative Standards of Review

Page 23: Added textual sentence and Johnson *citation to end of last paragraph in section*

The principle of stare decisis holds that a court is bound by its own precedent, and the principle militates against a change in the law and ensures that existing law will not be abandoned lightly. The supreme court has identified several criteria to be considered when it is asked to overturn prior cases. Those criteria include whether changes or developments on the law have undermined the rationale of the decision; whether there is a need to make a decision correspond to newly ascertained facts; whether the precedent has become detrimental to coherence and consistency in the law; and whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated. *Hinrichs v. Dow Chem. Co.*, 2020 WI 2, ¶¶ 66, 68, 389 Wis. 2d 669, 937 N.W.2d 37. Because the supreme court is not bound by decisions of the court of appeals, the supreme court can overrule court of appeals opinions without considering the role of stare decisis or the criteria (special justifications) for overturning precedent. *State v. Johnson*, 2023 WI 39, ¶ 20, 407 Wis. 2d 195, 990 N.W.2d 174.

3.22 Harmless Error

Pages 24–25: Replaced first paragraph after Comment *in section*

The burden of proving no prejudice is on the beneficiary of the error. *Dyess*, 124 Wis. 2d at 543. In criminal cases this requires the beneficiary of the error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. It must be proved beyond a reasonable doubt that a "rational jury" would have returned the verdict absent the error. *State v. Thomas*, 2023 WI 9, ¶ 11, 405 Wis. 2d 654, 985 N.W.2d 87.

Chapter 3
Standards of Review and the Decision to Appeal

I. Scope
[§ 3.1]

This chapter discusses laying a basis in the circuit court for a potential appeal and making the posttrial decision to appeal. The primacy of the circuit court in Wisconsin's justice system is recognized by waiver rules and standards of review. For example, an attorney who does not make a record in the circuit court will fail to obtain successful appellate review. [1]

Note. Waiver and forfeiture are used interchangeably in this chapter unless stated otherwise. *See infra* §§ 3.4, 3.8.

The nature of appellate review and the potential for success on appeal depend heavily on the standards of review applied by the appellate court. This chapter covers the standards of review for findings of fact, questions of law, and discretionary acts, as well as the rule limiting review to matters raised in the circuit court. There is also a brief treatment of harmless error.

Much of this chapter is based on a detailed outline on standards of review originally prepared by former Judges Richard S. Brown and Paul C. Gartzke of the court of appeals and now updated by Judge Thomas Hruz of that court and by court of appeals staff attorney Nathan Petrashek. The outline is reproduced in its entirety in appendix C, *infra*.

II. Primacy of Circuit Court in Appellate System [§ 3.2]

Appellate attorneys can greatly increase their understanding of the nature of the appellate process, and consequently their ability to prepare for and estimate the chances of a successful appeal, by recognizing the importance of the circuit court in the appellate scheme. Appellate review of circuit court actions is generally weighted, sometimes heavily, in favor of sustaining the circuit court.

In deference to the factual expertise of the trier of fact, to encourage litigation of all issues at one time, to simplify the appellate task, and to discourage a flood of appeals, appellate courts have limited the scope of their review. As a result, an attorney who does not put the necessary effort into a circuit court proceeding should not expect to be effective on appeal.

III. Circuit Court Record—Avoiding Waiver or Forfeiture [§ 3.3]

A. Raising Issues in the Circuit Court
[§ 3.4]

One of the major limitations on review is the general refusal of appellate courts to consider issues raised for the first time on appeal. *See, e.g.*, *Shadley v. Lloyds of London*, 2009 WI App 165, ¶ 25, 322 Wis. 2d 189, 776 N.W.2d 838. The party alleging error has the burden of establishing, by reference to the record, that the error was first raised in the circuit court. *Id.* ¶ 26. This rule is one of judicial administration and does not limit the power of an appellate court in a proper case to address issues not raised in the

circuit court. *State v. Moran*, 2005 WI 115, ¶ 31, 284 Wis. 2d 24, 700 N.W.2d 884, *overruled on other grounds by State v. Denny*, 2017 WI 17, ¶ 60, 373 Wis. 2d 390, 891 N.W.2d 144; *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593–94, 218 N.W.2d 129 (1974). Reasons for which an appellate court may choose to review a waived issue include the following: (1) the issue is of statewide importance or interest; (2) a question of law is presented that does not depend on the facts presented below; and (3) the issue is fully briefed, and there are no factual disputes. *Estate of Hegarty v. Beauchaine*, 2001 WI App 300, ¶¶ 11–13, 249 Wis. 2d 142, 638 N.W.2d 355. Given the workload of the appellate courts, however, it can fairly be said that they are much more likely to find waiver than to exercise their discretion to consider an issue raised for the first time on appeal.

While a failure to raise an issue in the circuit court is generally referred to as a *waiver*, case law makes clear that this failure is really a *forfeiture*, rather than an intentional waiver. *Estate of Miller v. Storey*, 2017 WI 99, ¶ 67, 378 Wis. 2d 358, 903 N.W.2d 759. Whether an issue is denoted waived or forfeited, an appellant bears the burden to show why the appellate court should consider an issue not raised in the circuit court. As stated in one case, the rule requiring issues to be raised first in the circuit court is "a bedrock principle of appellate practice." *In re Ambac Assurance Corp.*, 2012 WI 22, ¶ 35, 339 Wis. 2d 48, 810 N.W.2d 450. This waiver-forfeiture principle applies with equal force to the government when it is a party. *Id.* ¶ 37.

A major exception to the forfeiture rule is that objections to subject-matter jurisdiction may be raised for the first time on appeal. *City of Cedarburg v. Hansen*, 2020 WI 11, ¶ 49, 390 Wis. 2d 109, 938 N.W.2d 463. On the other hand, objections to competency, which concern whether the circuit court properly exercised its jurisdiction, are forfeited if not raised before appeal. *Id.* ¶¶ 47–49. Also, some constitutional rights—such as the right to counsel, the right to a jury trial, and the right to refrain from self-incrimination—are so fundamental that they can be forfeited only by express waiver, not by failure to object. *See State v. Coffee*, 2020 WI 1, ¶ 20, 389 Wis. 2d 627, 937 N.W.2d 579.

Among the reasons given for the general rule of refusing to consider issues raised for the first time on appeal, a rule often termed a *negative standard of review*, *see infra* app. C, is that failing to raise issues below deprives both the adversary and the circuit court of the opportunity to deal with them. *Terpstra*, 63 Wis. 2d at 593–94. The adversary could amend, withdraw, or provide additional proof. The circuit court could correct error or at least address the objection, thus giving the appellate court the benefit of its reasoning. The waiver rule clearly has its genesis in the deference appellate courts accord to circuit courts. While new *arguments* may be made on an *issue* raised below, the court of appeals will not "blindside trial courts with reversals based on theories which did not originate in their forum." *Gibson v. Overnite Transp. Co.*, 2003 WI App 210, ¶ 9, 267 Wis. 2d 429, 671 N.W.2d 388 (citation omitted). Appeal is not a trial de novo. Nonetheless, in certain cases, particularly those raising issues of great public importance, the appellate court may feel obliged to address a forfeited issue and thus blindside the circuit court. *See State v. Anderson*, 2015 WI App 92, ¶¶ 7–8, 366 Wis. 2d 147, 873 N.W.2d 82 (reviewing a moot, forfeited issue). Moreover, an appellate court need not address new arguments concerning previously raised issues. *Townsend v. Massey (In re Guardianship of Willa L.)*, 2011 WI App 160, ¶¶ 23–24, 338 Wis. 2d 114, 808 N.W.2d 155.

Consistent with the general refusal of the appellate courts to consider issues not raised at all in the circuit court, an appellate court may choose to decline review of issues that were not *properly* raised in the circuit court. *See Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶ 18 n.11, 291 Wis. 2d 283, 717 N.W.2d 17 (refusing to review issue raised in circuit court when circuit court declined to review that issue because it was not pleaded and therefore not properly before the circuit court). Failure to raise an issue in the court of appeals forfeits the right to raise it in the supreme court even though it was raised in the circuit court. *Veritas Steel, LLC v. Lunda Constr. Co.*, 2020 WI 3, ¶¶ 40, 42, 389 Wis. 2d 722, 937 N.W.2d 19.

A number of statutes reflect the rule requiring issues to be raised at the circuit court level. For example, Wis. Stat. § 805.13(3) provides that failure to object to a proposed instruction or verdict at the instruction conference constitutes waiver; however, a variance between the instructions given and those proposed is not waived error. Wis. Stat. § 805.13(4). Wis. Stat. § 901.03(1)(a) provides that error predicated on an erroneous evidentiary ruling cannot be raised on appeal unless objected to at trial. Wis. Stat. § 805.11(1) requires a party to object before a ruling or order to avoid waiver. Wis. Stat. §§ 974.02(2) and 805.17(4) provide that sufficiency of the evidence may be raised for the first time on appeals from criminal cases and trials to the court.

Note. Notwithstanding the specific language of Wis. Stat. § 805.13(3) that errors in jury instructions are waived absent objection at the instruction conference, the *supreme court* has discretion to review such errors. *State v. Beamon*, 2013 WI 47, ¶¶ 47–49, 347 Wis. 2d 559, 830 N.W.2d 681. It is not clear whether *Beamon* affects previous case law precluding the *court of appeals* from such discretionary review. *See State v. Ward*, 228 Wis. 2d 301, 305, 596 N.W.2d 887 (Ct. App. 1999).

The rule requiring matters to be first raised in the circuit court is limited to the appellant. *State v. Lock*, 2013 WI App 80, ¶ 40, 348 Wis. 2d 334, 833 N.W.2d 189. A respondent may advance any argument that will sustain the circuit court's ruling. *State v. Darcy N.K.*, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998). If a party failed to raise an issue in the underlying proceedings, that party is not barred from raising the issue on appeal if another party raised the issue below. *Town of Holland v. Public Serv. Comm'n*, 2018 WI App 38, ¶ 29 n.8, 382 Wis. 2d 799, 913 N.W.2d 914.

Finally, the rule requiring that an issue be raised before appeal also applies to administrative proceedings. *See, e.g.*, *Goranson v. Department of Indus., Lab. & Hum. Rels.*, 94 Wis. 2d 537, 545, 289 N.W.2d 270 (1980). Attorneys must remember to raise issues at each level of the proceedings. In other words, issues should be raised before the hearing examiner, before the agency itself, and before the circuit court. As in other types of cases, an appellate court has discretion to review issues not previously raised in administrative proceedings, but ordinarily will refuse to do so. *See, e.g.*, *M.M. Schranz Roofing, Inc. v. First Choice Temp.*, 2012 WI App 9, ¶ 23, 338 Wis. 2d 420, 809 N.W.2d 880.

B. Specific Objections and Postverdict Motions [§ 3.5]

Another aspect of the waiver rule is that issues must be raised with specificity or they may be waived. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 594, 218 N.W.2d 129 (1974). General objections are insufficient. For example, an objection to a set of jury instructions on the ground that it misstates the law will ordinarily be insufficient; the objection must identify the particular instruction, recite how it misstates the law, and point out the correct law.

The court of appeals has restated the rule that errors must be raised with particularity in postverdict motions if they are to be raised as of right in a later appeal. *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987). Moreover, the court has emphasized that the rule applies even when the issue was raised during trial. *Id.* Another case indicates that no error may be raised on appeal without a party first filing a motion for new trial. *Hartford Ins. Co. v. Wales*, 138 Wis. 2d 508, 515, 406 N.W.2d 426 (1987).

The supreme court has stated that, in both civil and criminal cases, errors that might be corrected by a new trial must be raised in a motion for new trial in the trial court in order for those errors to be considered on appeal as a matter of right. *State v. Monje*, 109 Wis. 2d 138, 151, 325 N.W.2d 695, 327 N.W.2d 641 (1982), *overruled on other grounds by State v. Smith*, 131 Wis. 2d 220, 235–36, 388 N.W.2d 601 (1986). The *Monje* rule has been legislatively modified, however, as to postconviction motions in criminal cases. Wis. Stat. § 974.02(2) provides that appellants are not required to file a postconviction motion if the grounds are limited to the sufficiency of the evidence or if the issues were previously raised in the trial court. Indeed, sufficiency of the evidence to support a criminal conviction may be raised for the first time on appeal; it need not have been previously raised either during trial or by postverdict motion. *See State v. Hayes*, 2004 WI 80, ¶ 54, 273 Wis. 2d 1, 681 N.W.2d 203. In all cases tried to the court, sufficiency of the evidence may be challenged for the first time on appeal. Wis. Stat. § 805.17(4). Therefore, with the exception of sufficiency of the evidence, the legislature has not modified the posttrial-motion requirement in civil cases.

In civil cases, errors that might be corrected by a new trial, except challenges to the sufficiency of the evidence, must be raised by posttrial motion as a prerequisite for appeal even if they were previously raised at trial. *See J.K. v. Peters*, 2011 WI App 149, ¶ 25, 337 Wis. 2d 504, 808 N.W.2d 141. This rule applies whether the case was tried by a jury or to the court. *Id.* ¶ 26.

As with other waived (forfeited) errors, an appellate court has the discretionary power to review errors that could have been corrected by a motion for a new trial, but holds such requests to a high standard. *Id.* ¶¶ 29–30 (refusing review of waived issue absent showing of probable miscarriage of justice); *see also Seifert v. Balink*, 2017 WI 2, ¶ 138, 372 Wis. 2d 525, 888 N.W.2d 816 (granting review when defendants contemporaneously objected to alleged errors but failed to move for mistrial).

A failure to raise manifest errors by a motion for reconsideration in the trial court constitutes a waiver of the right to raise such errors on appeal. *Schinner v. Schinner*, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988). A *manifest error* is defined as an error "due to oversight, omission or miscalculation … which tends to reveal itself as such to reasonable legal minds. It does not …. embrace those kinds of alleged errors which lend themselves to legitimate legal debate…." *Id*. at 92–93. Although stated in a family law case, and obviously aimed at reducing the number of family law appeals, the *Schinner* manifest-error rule is not specifically limited to family law appeals. An obvious example of a manifest error would be a numerical or mathematical error in a property

division or damages award. The proper manner of raising such errors is by motion for relief from judgment or order pursuant to Wis. Stat. § 806.07 or by motion for reconsideration pursuant to Wis. Stat. § 805.17(3). If the error is indeed manifest, it should also be possible to resolve the matter by a stipulation of the parties.

A motion for reconsideration under Wis. Stat. § 805.17(3) is not a prerequisite to appeal in cases of non-manifest error. *Armour v. Klecker*, 169 Wis. 2d 692, 696–97, 486 N.W.2d 563 (Ct. App. 1992). A motion for mistrial is not necessary to obtain appellate review of manifest errors. *Pophal v. Siverhus*, 168 Wis. 2d 533, 544, 484 N.W.2d 555 (Ct. App. 1992). Failure to move for mistrial does not waive the right to raise otherwise properly objected to rulings on appeal unless the alleged error was so serious that it warranted a mistrial. *Id*.

C. Other Types of Waiver
[§ 3.6]

Attorneys should recognize other waivers that go directly to the right to appeal. Perhaps the clearest is the rule that a plea of guilty or no contest constitutes a waiver of nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See State v. Princess Cinema*, 96 Wis. 2d 646, 651, 292 N.W.2d 807 (1980) (no-contest plea); *State ex rel. Harris v. Milwaukee City Fire & Police Comm'n*, 2012 WI App 23, ¶ 11, 339 Wis. 2d 434, 810 N.W.2d 488 (guilty plea). *But see State v. Wilcenski*, 2013 WI App 21, ¶ 2 n.2, 346 Wis. 2d 145, 827 N.W.2d 642 (holding that guilty plea was not a waiver when plea occurred after denial of a petition for leave to appeal). This rule has been extended from criminal cases to cover pleas in civil forfeiture actions. *See Racine Cnty. v. Smith*, 122 Wis. 2d 431, 362 N.W.2d 439 (Ct. App. 1984). Like an escape by a criminal defendant, an absconding by a juvenile from a residential treatment center has been held to effect a forfeiture of the right to appeal or seek postconviction relief. *State v. Lamontae D.M. (In the Int. of Lamontae D.M.)*, 223 Wis. 2d 503, 507–10, 589 N.W.2d 415 (Ct. App. 1998). The supreme court applied the same principle in dismissing a petition for review when the petitioner absconded from supervision on parole after the court initially granted review. *State v. Townsend*, 2007 WI 31, ¶¶ 1–2, 299 Wis. 2d 672, 728 N.W.2d 342.

A major exception to the waiver-by-plea rule is that, on appeal from a final judgment or order, a party may seek review of an order denying a motion to suppress evidence or challenging the admissibility of a statement, notwithstanding later entry of judgment or order entered upon an admission (to allegations in a petition under the Juvenile Justice Code) or a plea of guilty or no contest. Wis. Stat. §§ 808.03(3), 971.31(10); *see also State v. Conner*, 2012 WI App 105, ¶ 15, 344 Wis. 2d 233, 821 N.W.2d 267.

Closely related to waiver by plea is the concept that one may waive the right to appeal by causing or inducing a judgment or order to be entered or by consenting or stipulating to entry of judgment. *Racine Cnty.*, 122 Wis. 2d at 437. Stated another way, a defendant who actively contributes to a circuit court action is estopped from claiming on appeal that the action was an error. *State v. Darcy N.K.*, 218 Wis. 2d 640, 649, 581 N.W.2d 567 (Ct. App. 1998). Similarly, a party cannot appeal from an order if that party could have participated in the circuit court proceedings but chose not to. *In re Ambac Assurance Corp.*, 2012 WI 22, ¶ 36, 339 Wis. 2d 48, 810 N.W.2d 450. As explained in one decision, when a party has invited circuit court error, that party is estopped from later complaining on appeal. *State v. Freymiller (In re Support of C.L.F.)*, 2007 WI App 6, ¶ 15, 298 Wis. 2d 333, 727 N.W.2d 334. In such cases, however, the appellate court has discretion to disregard the waiver and address the merits if it so chooses. *Id.* ¶ 17. A party who stipulates to the entry of a judgment cannot condition that judgment on the outcome of a subsequent appeal. *See Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 569 N.W.2d 45 (Ct. App. 1997). In such circumstances, the appeal will be dismissed, leaving the parties bound by their stipulated judgment. In some cases, waiver may also result from accepting the benefits of a judgment or complying with a judgment. *See Riley v. Lawson*, 210 Wis. 2d 478, 488, 565 N.W.2d 266 (Ct. App. 1997). Stipulating to a final order while reserving the right to appeal is not, however, a waiver of the right to appeal when the stipulation expressly states that it is not a waiver of appeal rights. *See Sanders v. Estate of Sanders (In re Est. of Sanders)*, 2008 WI 63, ¶ 37, 310 Wis. 2d 175, 750 N.W.2d 806. Conversely, a stipulation expressly waiving the right to appeal will be upheld. *See Ceria M. Travis Acad., Inc. v. Evers*, 2016 WI App 86, ¶¶ 23–26, 372 Wis. 2d 423, 887 N.W.2d 904 (upholding waiver of Wis. Stat. ch. 227 review rights). The stipulated waiver must be clear and "not made out by way of inference." *Id.* ¶ 26 (citing *Dillon v. Dillon*, 244 Wis. 122, 130, 11 N.W.2d 628 (1943)). In an appeal against several parties, settling the appeal against some adverse parties does not waive the right to continue the appeal against a remaining party. *Grigg v. Aarrowcast*, 2018 WI App 17, ¶¶ 73–77, 380 Wis. 2d 464, 909 NW 2d 183.

When the purpose of an appeal is to seek a more favorable award, the acceptance of or use of the property awarded is not a waiver of the right to appeal. *Schinner v. Schinner*, 143 Wis. 2d 81, 88, 420 N.W.2d 381 (Ct. App. 1988); *see also McFarland State*

Bank v. Sherry, 2012 WI App 4, ¶¶ 15–18, 338 Wis. 2d 462, 809 N.W.2d 58. Attorneys should be aware, however, that this is not the case when a trial court gives a party the option, pursuant to Wis. Stat. § 805.15(6), either to accept an increased award or to have a new trial. *See Farrell v. John Deere Co.*, 151 Wis. 2d 45, 72–74, 443 N.W.2d 50 (Ct. App. 1989).

D. Exceptions to Waiver Rule [§ 3.7]

1. Constitutional Issues and Plain Error [§ 3.8]

When will an appellate court exercise its discretion and review a waived issue? The two most common exceptions to the general waiver rule are when allegations of constitutional issues or plain error are involved. The court will consider a constitutional issue raised for the first time on appeal if it is in the best interest of justice to do so, if both parties have had an opportunity to brief the issue, and if there are no factual issues that must be resolved. *See, e.g.*, *L.K. v. B.B. (In the Int. of Baby Girl K.)*, 113 Wis. 2d 429, 448, 335 N.W.2d 846 (1983). *But see State v. Marshall*, 113 Wis. 2d 643, 653–54, 335 N.W.2d 612 (1983). Constitutional issues generally are not deemed waived unless there is an express waiver; constitutional rights cannot be "forfeited" by mere failure to object. *See State v. Saunders*, 2011 WI App 156, ¶ 29 n.5, 338 Wis. 2d 160, 807 N.W.2d 679 (holding that failure to notify trial court of a sleeping juror constituted forfeiture of the right to raise the issue because the issue was one of juror misconduct, not the constitutional right to trial by jury). Plain errors are errors that are so plain or so fundamental as to affect the appellant's substantial rights. Wis. Stat. §§ 901.03(4), 805.18(2); *State v. Sonnenberg*, 117 Wis. 2d 159, 176–77, 344 N.W.2d 95 (1984). Although review of waived plain errors is generally granted, it is discretionary. *State v. Paulson*, 106 Wis. 2d 96, 104–05, 315 N.W.2d 350 (1982). It is the defendant's burden to show plain error. *Id.* at 106. Waiver may be found even if it is clear that, but for the waiver, the error would entitle the defendant to a new trial. *State v. Erickson*, 227 Wis. 2d 758, 767, 596 N.W.2d 749 (1999).

2. Jurisdictional Issues [§ 3.9]

Other exceptions to the general rule requiring matters to be raised in the circuit court include jurisdictional matters. Personal jurisdiction may be considered in the discretion of the appellate court. *See, e.g.*, *Kochel v. Hartford Accident & Indem. Co.*, 66 Wis. 2d 405, 415, 225 N.W.2d 604 (1975). Subject-matter jurisdiction may be raised at any time, and the court has a duty to consider it sua sponte. *See, e.g.*, *State ex rel. Teaching Assistants Ass'n v. University of Wis.-Madison*, 96 Wis. 2d 492, 495, 292 N.W.2d 657 (Ct. App. 1980). While a court *must* review subject-matter jurisdiction sua sponte, it *may* review other waived issues in the sua sponte exercise of its discretion, particularly if the litigation has a broad impact on the public interest. *Kaye v. Board of Regents*, 158 Wis. 2d 664, 668, 463 N.W.2d 398 (Ct. App. 1990).

3. Other Exceptions [§ 3.10]

The courts also have indicated a willingness to review waived errors in cases in which the issue is one of law, the facts are not disputed, the issue has been thoroughly briefed by both sides, and the question is one of sufficient interest to merit a decision. *City News & Novelty, Inc. v. City of Waukesha*, 170 Wis. 2d 14, 20–21, 487 N.W.2d 316 (Ct. App. 1992). Note that *City News* was a summary-judgment case, and this exception would be most likely to pertain in summary-judgment cases. Another common exception to the waiver rule is in cases in which the law has changed since the circuit court issued its decision. *See United States Fire Ins. Co. v. Good Humor Corp.*, 173 Wis. 2d 804, 836, 496 N.W.2d 730 (Ct. App. 1993). The likelihood that the error will recur is another factor to be considered in granting review. *See Olmsted v. Circuit Ct. for Dane Cnty.*, 2000 WI App 261, ¶ 12, 240 Wis. 2d 197, 622 N.W.2d 29 (noting also that issue was of sufficient public interest to merit a decision).

IV. Standards of Review: Institutional Considerations in Decision to Appeal [§ 3.11]

Another indicator of an appellate court's deference to the circuit court, and a central factor in understanding the appellate court's tasks and the appellant's chances of success, is the standard of review. These standards are tests by which appellate courts determine the correctness of certain circuit court actions. Attorneys who understand the nature and role of standards of review and avoid treating all circuit court errors as equally significant will be in a better position to determine which issues to emphasize, to evaluate the likelihood of an appeal succeeding, and to decide whether an appeal should even be taken.

The concept of standard of review is based on several factors. First, the concept recognizes that trial judges and juries are in a better position to consider and decide some issues, whereas reviewing courts are in a better position to handle others. In addition, standards of review promote uniformity by telling appellate courts what their function is, conserve judicial energy by providing a framework for analyzing appeals, and limit the potential for compounding error with new error by focusing appellate review within specific boundaries.

There are three basic categories of review: review of findings of fact, review of questions of law, and review of discretionary acts. Each category has a different standard of review on appeal. These standards are discussed in the following sections; for further information on standards of review, consult the outline in appendix C, *infra*.

For special standards governing review of arbitration awards, see *In re Arbitration Between Winkelman v. Kraft Foods, Inc.*, 2005 WI App 25, ¶¶ 7–9, 279 Wis. 2d 335, 693 N.W.2d 756.

V. Review of Findings of Fact [§ 3.12]

A. In General [§ 3.13]

The standards of review for factual findings are based on the premise that the trier of fact, whether it be a judge or a jury, is better able to make factual determinations than is a reviewing court. Limited to the record before it, the appellate court is ill-suited to considering the variables that go into fact-finding. With so many cases turning on questions of credibility, how can an appellate court, which is unable to evaluate factors such as demeanor, substitute its judgment for that of the trier of fact?

The result is a policy, reflected in the standards of review governing factual findings, that pays substantial deference to the finder of fact. Generally speaking, an appeal premised solely on an error of fact is unlikely to succeed.

In a limited number of situations, however, the appellate court owes no deference to the fact-finder. These are cases when the reviewing court is just as capable of determining the facts as is the trier of fact. This is true, for example, when the factual findings go to the reasonableness of attorney fees. *See, e.g.*, *State v. DeKeyser*, 29 Wis. 2d 132, 139, 138 N.W.2d 129 (1965). Another example would be findings arising out of certain types of documentary evidence. *See McCauley v. Tropic of Cancer*, 20 Wis. 2d 134, 148, 121 N.W.2d 545 (1963). One might ask, however, whether findings drawn from documentary evidence are really conclusions of law, rather than findings of fact. It is often difficult to determine with absolute certainty whether a finding is one of fact, law, or discretion. *Nottelson v. Department of Indus., Lab. & Hum. Rels.*, 94 Wis. 2d 106, 115 & n.7, 287 N.W.2d 763 (1980). The court of appeals rejected an appellant's effort to characterize video evidence as documentary evidence subject to de novo review in *State v Walli*, 2011 WI App 86, ¶¶ 13–17, 334 Wis. 2d 402, 799 N.W.2d 898 (holding that when record evidence consists of disputed testimony and video recording, appellate court applies clearly erroneous standard to circuit court's findings based on the video).

B. Trial Court Findings [§ 3.14]

Trial court findings of fact will be affirmed unless they are clearly erroneous. Wis. Stat. § 805.17(2). This statutory standard of review is the same as the older standard from the case law, which mandates the affirmance of trial court findings unless they are "against the great weight and clear preponderance of the evidence." *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

These two different ways of stating the standard of review for trial court findings apparently occurred in 1975 when the Wisconsin Legislature, enacting the state's new procedure code, borrowed language from the Federal Rules of Civil Procedure without realizing that the federal code contained a new standard. When the courts discovered the statutory language, there was some confusion, but the issue was resolved by the expedient of pronouncing the standards one and the same.

The result is that the standard of review for findings of fact made by a trial court is that they will be affirmed unless clearly erroneous, which means they will not be reversed unless they are against the great weight and clear preponderance of the evidence. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 39, 319 Wis. 2d 1, 768 N.W.2d 615. The evidence supporting the findings need not constitute the great weight and clear preponderance of the evidence. Rather, to command a reversal, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *Cogswell v. Robertshaw Controls*

Co., 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979). In addition, when a trial judge acts as a finder of fact and there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. *Stevenson v. Stevenson*, 2009 WI App 29, ¶ 14, 316 Wis. 2d 442, 765 N.W.2d 811. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. *Id.*

Caution. The standard of review is heavily weighted in support of the trial court's findings. An appellant who hopes to overturn a trial court finding of fact on appeal must realize that he or she shoulders a heavy burden.

Note. In an opinion reviewing a circuit court finding of competency to stand trial, the supreme court applied a clearly erroneous standard that is "particularized to competency findings." *State v. Smith*, 2016 WI 23, ¶ 26, 367 Wis. 2d 483, 878 N.W.2d 135. In other words, this standard should be limited to competency determinations. In such cases, the test is whether the circuit court's determination is totally unsupported by the facts of record. *Id.* ¶ 27. As pointed out by the dissent, the majority's articulation of this test is not the same as the generally accepted great-weight and clear-preponderance test. *See id.* ¶ 101 (Abrahamson, J., dissenting).

C. Jury Findings [§ 3.15]

An even heavier burden awaits the appellant who challenges the findings of fact reached by a jury. Because of the paramount role the jury plays in our common-law tradition, a jury's finding of fact is not easily overturned. In a civil case, a jury finding will not be overturned if there is *any* credible evidence that, under any reasonable view, supports the verdict and removes the question from the realm of conjecture and speculation. *See, e.g.*, *Porter v. Ford Motor Co.*, 2015 WI App 39, ¶ 14, 362 Wis. 2d 505, 865 N.W.2d 207. The jury is the ultimate arbiter of credibility, and the appellate court will view the evidence in the light most favorable to the verdict. *See, e.g.*, *id.* It is the reviewing court's duty to search for credible evidence to sustain the jury's verdict. *See, e.g.*, *City of Milwaukee v. NL Indus.*, 2008 WI App 181, ¶ 21, 315 Wis. 2d 443, 762 N.W.2d 757. It will not search the record on appeal for evidence to sustain a verdict that the jury could have reached but did not. *Id.*

In criminal cases, the jury is afforded similar, although slightly less deferential, treatment. The test is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt. A jury verdict cannot, however, be upheld on the sole ground that there is "some evidence" to support the verdict. *State v. Hauk*, 2002 WI App 226, ¶ 11, 257 Wis. 2d 579, 652 N.W.2d 393. The jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. *State v. Alles*, 106 Wis. 2d 368, 376–77, 316 N.W.2d 378 (1982). Furthermore, it is not necessary that the reviewing court be convinced of the defendant's guilt, only that the court be satisfied that the jury, acting reasonably, could be so convinced. A conviction may be based in whole or in part on circumstantial evidence. The test for circumstantial evidence is whether it is strong enough to exclude every reasonable hypothesis of innocence. *State v. Koller*, 87 Wis. 2d 253, 266, 274 N.W.2d 651 (1979).

Finally, in the great majority of administrative law cases, the scope of appellate review is the same as that employed in the circuit court. *Gilbert v. Medical Examining Bd.*, 119 Wis. 2d 168, 194, 349 N.W.2d 68 (1984). The administrative scope of review is set forth in detail in Wis. Stat. § 227.57. *See also infra* §§ 28.17–.22, app. C.

VI. Review of Questions of Law [§ 3.16]

A. In General [§ 3.17]

Whether the facts fulfill a particular legal standard is a question of law. *See, e.g.*, *Nottelson v. Department of Indus., Lab. & Hum. Rels.*, 94 Wis. 2d 106, 116, 287 N.W.2d 763 (1980).

Whereas the standards of review recognize that the facts are the province of the trier of fact, they make clear that legal questions are the province of the appellate courts and are reviewable *ab initio*. *See, e.g.*, *Board of Regents v. Personnel Comm'n*, 103 Wis. 2d 545, 551, 309 N.W.2d 366 (Ct. App. 1981). This is not to say that appellate courts pay no attention to a circuit court's conclusions or interpretations of the law; the appellate court is always interested in the circuit court's position. But a reviewing court is not bound

by, and need not defer to, a circuit court's conclusions of law. *Omernick v. Lepak (In re of Est. of Omernik)*, 112 Wis. 2d 285, 290, 332 N.W.2d 307 (1983).

In cases involving administrative law, all review is de novo, except that the reviewing court may give "due weight" to the agency's determination as part of the court's de novo review. *Tetra Tech EC, Inc., v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion). This is a major change from previous practice, which had accorded varying levels of deference to administrative agencies' conclusions of law. *See infra* § 28.20.

B. Types of Questions of Law [§ 3.18]

Among the most common questions of law that appellate courts will consider de novo is the meaning of a written instrument, such as a contract. *See Jones v. Jenkins*, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). (However, if an ambiguity exists in the instrument that requires resorting to materials outside the four corners of the document to ascertain its meaning, a question of fact is presented, and the appellate court will review the matter as a finding of fact. *Id*.)

Other common situations in which a question of law is presented include the following:

1. The construction of statutes and agency rules, *see, e.g.*, *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 36, 319 Wis. 2d 1, 768 N.W.2d 615 (statutory construction); *United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, 2016 WI 13, ¶ 30, 367 Wis. 2d 131, 876 N.W.2d 99 (agency rules construction);

2. Situations in which only one inference can be drawn from the facts, *see, e.g.*, *Vocational, Tech. & Adult Educ., Dist. 13 v. Department of Indus., Lab. & Hum. Rels.*, 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977);

3. Situations involving undisputed or stipulated facts, *see, e.g.*, *State v. Williams*, 104 Wis. 2d 15, 21–22, 310 N.W.2d 601 (1981) (undisputed facts); *First Nat'l Lease Corp. v. City of Madison*, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977) (stipulated facts);

4. The applicability of the statute of limitation, *see, e.g.*, *Scott v. First State Ins. Co.*, 151 Wis. 2d 286, 293, 444 N.W.2d 405 (Ct. App. 1989), *aff'd*, 155 Wis. 2d 608, 456 N.W.2d 152 (1990);

5. The application of constitutional principles to the facts of a case, *see, e.g.*, *Farrell v. John Deere Co.*, 151 Wis. 2d 45, 62, 443 N.W.2d 50 (Ct. App. 1989);

6. Whether the complaint states a claim for relief, *see, e.g.*, *PRN Assocs. LLC v. Department of Admin.*, 2009 WI 53, ¶ 26, 317 Wis. 2d 656, 766 N.W.2d 559;

7. Whether an issue is moot, *id.* ¶ 25;

8. Whether a party has standing, *Darboy Joint Sanitary Dist. No. 1 v. City of Kaukauna*, 2013 WI App 113, ¶ 19, 350 Wis. 2d 435, 838 N.W.2d 103;

9. The constitutionality of a statute, *see, e.g.*, *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63;

10. Application of claim-preclusion principles, *see, e.g.*, *Schaeffer v. Personnel Comm'n*, 150 Wis. 2d 132, 138, 441 N.W.2d 292 (Ct. App. 1989);

11. Whether a matter has been actually litigated for the purposes of issue preclusion, *Flooring Brokers, Inc., v Florstar Sales, Inc.*, 2010 WI App 40, ¶ 7, 324 Wis. 2d 196, 781 N.W.2d 248;

12. Whether a party has met the required burden of proof, *see, e.g.*, *Brandt v. Brandt*, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988);

13. Review of an order granting judgment on the pleadings, *see, e.g.*, *Soderlund v. Zibolski*, 2016 WI App 6, ¶ 21, 366 Wis. 2d 579, 874 N.W.2d 561;

14. Whether an action is frivolous as defined by statute, *see, e.g.*, *Lamb v. Manning*, 145 Wis. 2d 619, 628, 427 N.W.2d 437 (Ct. App. 1988); *but see Keller v. Patterson*, 2012 WI App 78, ¶¶ 21–22, 343 Wis. 2d 569, 819 N.W.2d 841 (applying different standards of review to whether action is *commenced* frivolously versus whether action is *continued* frivolously; appellate court reviews first issue with deference to circuit court but reviews second issue de novo); and

15. Determination of a motion for summary judgment, *see, e.g.*, *Lamar Cent. Outdoor, LLC v. Department of Transp.*, 2008 WI App 187, ¶ 16, 315 Wis. 2d 190, 762 N.W.2d 745.

C. Mixed Questions of Fact and Law [§ 3.19]

As previously mentioned, *see supra* § 3.13, it can sometimes be difficult to distinguish between questions of law and questions of fact. This is particularly true when dealing with questions of ultimate fact, such as negligence. A hybrid has been recognized that is known as the *mixed question of fact and law*. A mixed question is one that requires the court to determine (1) what happened, and (2) whether those facts fulfill a particular legal standard. *State v. Gollon*, 115 Wis. 2d 592, 600, 340 N.W.2d 912 (Ct. App. 1983). The standard of review of mixed questions is to apply the great-weight or clearly erroneous standard to the factual part, *see supra* § 3.14, while independently reviewing the conclusion of law. *Department of Revenue v. Exxon Corp.*, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979), *aff'd*, 447 U.S. 207 (1980). When the circuit court's legal conclusion is intertwined with factual findings, an appellate court may give weight to the circuit court's conclusion. *See Leasefirst v. Hartford Rexall Drugs, Inc.*, 168 Wis. 2d 83, 89, 483 N.W.2d 585 (Ct. App. 1992). An example of a mixed question is adverse possession: the appellate court accepts the circuit court's factual findings unless clearly erroneous but reviews de novo whether those facts satisfy the legal standard of adverse possession. *Peter H. & Barbara J. Steuck Living Tr. v Easley*, 2010 WI App 74, ¶ 11, 325 Wis. 2d 455, 785 N.W.2d 631. Another example is the denial of a motion to suppress evidence; the reviewing court will uphold factual findings as to police conduct unless clearly erroneous, but whether that conduct violated constitutional standards is a question of law that the court reviews independently. *See, e.g.*, *State v. Gant*, 2015 WI App 83, ¶ 12, 365 Wis. 2d 510, 872 N.W.2d 137. In some cases, however, the legal conclusion may be so intimately related to the findings of fact that the appellate court should apply the "clearly erroneous" fact-finding standard to the circuit court's determination of law or ultimate fact. *See State v. Daniel*, 2015 WI 44, ¶ 52, 362 Wis. 2d 74, 862 N.W.2d 867 (quoting *State v. Byrge*, 2000 WI 101, ¶ 4, 237 Wis. 2d 197, 614 N.W.2d 477 (holding that circuit court's "findings" on whether a defendant is competent to stand trial "will not be upset unless they are clearly erroneous because a competency hearing presents a unique category of inquiry in which the circuit court is in the best position to apply the law to the facts")).

In a number of cases, the appellate courts have recognized a category of fact known as constitutional fact. In *State v. Arroyo*, 166 Wis. 2d 74, 79, 479 N.W.2d 549 (Ct. App. 1991), the court held that the voluntariness of a confession is a question of constitutional fact to be independently reviewed by the appellate court. Questions of constitutional fact present a mixed question of fact and law; when considering such a question, the appellate court first reviews the circuit court's findings of fact under the clearly erroneous standard and then reviews the constitutional impact of those findings under a de novo standard. *See State v. Edler*, 2013 WI 73, ¶ 20, 350 Wis. 2d 1, 833 N.W.2d 564. An order granting or denying a motion to suppress evidence presents a question of constitutional fact. *State v. Dieter*, 2020 WI App 49, ¶ 8, 393 Wis. 2d 796, 948 N.W.2d 431 (review denied).

VII. Review of Discretionary Acts [§ 3.20]

Trial judges are accorded wide latitude to make decisions in the exercise of their discretion. Examples of discretionary acts include issuing orders pertaining to revival of actions, venue, continuances, extensions and stays, temporary injunctions, adding parties, intervention, dismissal for want of prosecution, discovery, jury view, selection and empaneling of the jury, order of proof, examination of witnesses, admission of evidence, argument of counsel, instructions to juries, attachments, supplementary proceedings, relief from judgments and costs, injunctions, award of maintenance, division of property, custody of children, and sentencing.

An appellate court will sustain a discretionary act if it finds that the circuit court (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Dane Cnty. Dep't of Hum. Servs. v. Mable K. (In re Termination of Parental Rts. to Isaiah H.)*, 2013 WI 28, ¶ 39, 346 Wis. 2d 396, 828 N.W.2d 198. The Wisconsin Supreme Court has emphasized that discretion is not simply decision-making. Rather, the term *discretion* contemplates a reasoning process that depends on facts that are in, or can reasonably be inferred from, the record and on a

conclusion based on proper legal standards. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). There must be evidence in the appellate record that the circuit court followed this kind of reasoning process. *Id*.

A discretionary decision will be upheld absent a misuse of discretion. *See, e.g.*, *Johnson v. Johnson*, 78 Wis. 2d 137, 143–44, 254 N.W.2d 198 (1977). The circuit court's failure to delineate the factors that influenced its decision constitutes a misuse of discretion. *McCleary*, 49 Wis. 2d at 282. Of course, making an error of law also constitutes a misuse of discretion. *State v. Hutnik*, 39 Wis. 2d 754, 763, 159 N.W.2d 733 (1968).

Note. Although these cases had referred to this standard of review as one for "abuse of discretion," it is now typically referred to as one for a "misuse of discretion." The term *abuse of discretion* has been abandoned on the ground that the word "abuse" carries unjustified negative connotations. *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992) (expressing preference for use of term "erroneous exercise of discretion"). The standard of review for an abuse of discretion or a misuse or erroneous exercise of discretion is identical. *Id*.

In the great majority of cases, discretionary decisions are affirmed if the circuit court has explained its reasoning. When a trial judge fails to provide adequate reasoning, the reviewing court may do any of the following: (1) look to the circuit court's memorandum decision for findings and conclusions, (2) review the record itself and affirm if a preponderance of the evidence clearly supports the circuit court's judgment, (3) reverse if the judgment is not so supported, or (4) remand for further findings and conclusions. *Minguey v. Brookens (In re Termination of Parental Rts. to T.R.M.)*, 100 Wis. 2d 681, 688, 303 N.W.2d 581 (1981). The proper course of action when a reviewing court finds a misuse of discretion is for the appellate court to reverse and remand for a proper exercise of discretion, not for the appellate court to exercise discretion and draw its own conclusions. *King v. King*, 224 Wis. 2d 235, 254, 590 N.W.2d 480 (1999).

The supreme court has stated that an appellate court should not attempt to remedy a circuit court's omission or inadequate reasoning by searching the record for reasons to support the decision. *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 434–35, 293 N.W.2d 540 (1980). When a circuit court has failed to make findings, particularly in family law cases, appellate courts are inclined to remand for further findings. *Minguey*, 100 Wis. 2d at 688.

Notwithstanding these cases, however, appellate courts often do exercise their discretionary authority to search the record for support for the circuit court's decision. This is primarily because the number of reversals would otherwise be staggering. Particularly in the family law area, in which discretionary decisions about property division and maintenance require the consideration of numerous statutory factors, the circuit courts often fail to consider all the factors simply because of case volume and time constraints.

However, merely because the court of appeals frequently has chosen to supply reasoning missing from circuit court decisions, attorneys should not count on the court doing so. Even in family law cases, reversals for an erroneous exercise of discretion account for a significant number of reversals by the court of appeals. If possible, prevailing counsel should anticipate an appeal by offering to draft findings and conclusions if the circuit court has failed to fully exercise its discretion. If the circuit court is issuing an oral decision, counsel should raise the necessary issues for the judge to comment upon. The most important factor in reviewing a discretionary decision on appeal is evidence of the circuit court's reasoning.

VIII. Negative Standards of Review [§ 3.21]

In addition to the three main standards of review—for factual findings, questions of law, and discretionary acts—appellate courts have adopted other rules of review that have the effect of limiting review. The most significant of these so-called negative standards of review, the rule that issues cannot be raised for the first time on appeal, is discussed in section 3.4, *supra*.

Another standard, the doctrine of judicial estoppel, precludes a party from asserting a position in one proceeding and then subsequently adopting an inconsistent position. *State v. Vice*, 2020 WI App 34, ¶ 45, 392 Wis. 2d 754, 946 N.W.2d 206, *rev'd on other grounds*, 2021 WI 63, 397 Wis. 2d 682, 961 N.W.2d 1. Similarly, the law-of-the-case doctrine establishes that a legal decision establishes precedent that must be followed in subsequent proceedings. *Id.* But because neither doctrine is absolute, a court may decline to follow the doctrines in the exercise of discretion. *Id*.

Another "negative" standard often encountered is the bar on review of moot issues. An issue is moot when its resolution can have no practical effect on the controversy. *Marathon Cnty. v. D.K. (In re Condition of D.K.)*, 2020 WI 8, ¶ 19, 390 Wis. 2d 50, 937 N.W.2d 901. To determine whether an issue is moot, the court looks to the requested relief. If there is any relief that can be granted, the matter is not moot. *PRN Assocs. LLC v. Department of Admin.*, 2009 WI 53, ¶¶ 30–31, 317 Wis. 2d 656, 766 N.W.2d 559. Moreover, even if an appeal is facially moot—for example, when a challenged civil commitment has expired—there still may be a basis for a challenge if "collateral consequences" remain extant. *See Marathon Cnty.*, 2020 WI 8, ¶ 25, 390 Wis. 2d 50 (holding that challenge to expired civil commitment was not barred by mootness because that commitment still subjected appellant to collateral consequence of firearms ban). An appellate court may review a moot issue if (1) the issue is of great public importance, (2) the situation occurs so frequently that a decision is necessary to guide the circuit courts, (3) the issue is likely to arise again and a decision will alleviate uncertainty, or (4) the issue is likely to be repeated but evades appellate review. *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 5, 245 Wis. 2d 607, 629 N.W.2d 686. In a case rendered moot because the defendant had been released from custody, the court agreed to review the denial of a sentence adjustment because the issue presented—whether the sentence adjustment statute applied to enhanced terms of misdemeanor imprisonment—was of great public importance and likely to be repeated but evade review. *See State v. Anderson*, 2015 WI App 92, ¶ 8, 366 Wis. 2d 147, 873 N.W.2d 82. Judicial economy is a primary basis for refusing to consider a moot issue. *See Tarrant v. Wisconsin Dep't of Health Servs.*, 2019 WI App 45, ¶ 15 n.5, 388 Wis. 2d 461, 933 N.W.2d 145. A motion to dismiss alleging mootness filed after the appellate court has drafted its decision but before its release will not promote judicial economy. *Id*.

Yet another negative standard of review is laches, a discretionary doctrine founded on the notion that equity aids the vigilant, not those who sleep on their rights to the detriment of others. *See Trump v. Biden*, 2020 WI 91, ¶¶ 10–12, 394 Wis. 2d 629, 951 N.W.2d 568, *cert. denied*, 141 S. Ct. 1387 (2021). Although applicable in any type of case, laches is particularly pertinent in cases involving election ballot challenges. *Id.* Laches is available based on unreasonable delay, lack of knowledge a claim would be raised, and prejudice. *Id.* ¶ 10.

Among the other review-limiting factors that have been identified as negative standards of review are lack of standing, failure to exhaust administrative remedies, and lack of a justiciable controversy. These are discussed in appendix C, *infra*. In addition to these well-recognized limitations on review, appendix C, *infra*, also includes situations such as the following: when issues are raised but not argued or supported by authority, when a respondent fails to reply to an appellant's argument, and when issues need not be decided because another point disposes of the appeal.

The principle of stare decisis holds that a court is bound by its own precedent, and the principle militates against a change in the law and ensures that existing law will not be abandoned lightly. The supreme court has identified several criteria to be considered when it is asked to overturn prior cases. Those criteria include whether changes or developments on the law have undermined the rationale of the decision; whether there is a need to make a decision correspond to newly ascertained facts; whether the precedent has become detrimental to coherence and consistency in the law; and whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated. *Hinrichs v. Dow Chem. Co.*, 2020 WI 2, ¶¶ 66, 68, 389 Wis. 2d 669, 937 N.W.2d 37.

IX. Harmless Error [§ 3.22]

Although not really a standard of review, the concept of harmless error serves many of the same functions. It limits reversal to prejudicial errors and promotes the integrity of the trial court by recognizing that minor errors that do not warrant reversal can occur during a trial. The concept of harmless error also simplifies the appellate task by allowing the appellate court to concentrate on more significant errors. Finally, harmless error is an important factor for attorneys to consider in deciding whether to appeal and in choosing and presenting issues to argue before an appellate court. It makes little sense to appeal or argue errors that, although manifest, are not prejudicial.

The basic concept of harmless error is that only prejudicial errors may form a basis for reversal. This concept is reflected in the broad statutory prohibition in Wis. Stat. § 805.18(2) against reversal unless the error complained of has affected the substantial rights of the party seeking relief. Although Wis. Stat. § 805.18(2) is in the code of civil procedure, it also applies in criminal cases. *See State v. Moore*, 2015 WI 54, ¶ 93, 363 Wis. 2d 376, 864 N.W.2d 827. The harmless-error concept, which predates the Civil War, constitutes a presumption against error being prejudicial. *See City of La Crosse v. Jiracek Cos.*, 108 Wis. 2d 684, 690, 324 N.W.2d 440 (Ct. App. 1982).

One of the recurring problems in analyzing harmless error is that the opinions often fail to use the same language when stating the same rule. The general harmless-error rule stated in *Jiracek* indicated that reversal would not follow unless the result "might, probably" have been different. Other cases obviously referring to the same rule have premised reversible error on a showing simply that the result "probably" would have been different but for the error. *Jax v. Jax*, 73 Wis. 2d 572, 582, 243 N.W.2d 831 (1976); *Lutz v. Shelby Mut. Ins. Co.*, 70 Wis. 2d 743, 751, 235 N.W.2d 426 (1975).

This confusion has been resolved by the supreme court's declaration of a single harmless-error test in all cases, civil and criminal: for an error to "affect[] the substantial rights" of a party under Wis. Stat. § 805.18(2), there must be a "reasonable possibility" that the error contributed to the outcome of the action or proceeding. *Evelyn C.R. v. Tykila S. (In re Termination of Parental Rts. to Jayton S.)*, 2001 WI 110, ¶ 28, 246 Wis. 2d 1, 629 N.W.2d 768 (citing *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985)). A reasonable possibility of a different outcome is a possibility sufficient to undermine the confidence in the outcome. *Id*.

Comment. Notwithstanding the efforts of the opinions in *Evelyn C.R.* and *Dyess* to clarify the standard of harmless error, the confusion continues. In *State v. Nieves*, 2017 WI 69, ¶ 17, 376 Wis. 2d 300, 897 N.W.2d 363, the supreme court recited the rule as requiring a "reasonable probability of a different outcome," citing *State v. Kleser*, 2010 WI 88, ¶ 94, 328 Wis. 2d 42, 786 N.W.2d 144, which in turn relied on *Dyess* and *Strickland v. Washington*, 466 U.S. 668 (1984), as authority for a "reasonable probability" test. This is a misreading of *Dyess* and *Strickland*. As made clear in *Dyess*, 124 Wis. 2d at 543, the harmless-error rule in Wisconsin is whether a different outcome is a "reasonable possibility." Furthermore, *Dyess* explained that the "reasonable probability" test in *Strickland* is the same as the "reasonable possibility" test because *Strickland* explained that the reasonable probability need not be "more likely than not." *Id.* at 544–45 (citing *Strickland*, 466 U.S. at 693).

The burden of proving no prejudice is on the beneficiary of the error. *Dyess*, 124 Wis. 2d at 543. In criminal cases this requires the beneficiary of the error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. The error itself must be harmless "beyond a reasonable doubt." *State v. Poh*, 116 Wis. 2d 510, 529, 343 N.W.2d 108 (1984); *see State v. Anderson*, 2006 WI 77, ¶¶ 114–115, 291 Wis. 2d 673, 717 N.W.2d 74 (discussing alternative formulations of the beyond-a-reasonable-doubt standard), *overruled on other grounds by State v. Alexander*, 2013 WI 77, ¶ 28, 349 Wis. 2d 327, 833 N.W.2d 126.

Although the federal harmless-error rule in criminal cases has been weakened, *see Rosa v. Peters*, 36 F.3d 625, 631 & n.12 (7th Cir. 1994), Wisconsin continues to use the harmless-error rule set forth in *Dyess*. *See State v. Sanchez*, 201 Wis. 2d 219, 231, 548 N.W.2d 69 (1996). Wisconsin does recognize, however, that the burden of proving prejudice shifts to the defendant when the error alleged is ineffective assistance of counsel. *Id*. at 232.

A reviewing court assesses the harmlessness of an error in light of its effect on an average jury. The issue is whether it is beyond a reasonable doubt that the jury would have come to the same conclusion absent the error. *State v. Magett*, 2014 WI 67, ¶ 29, 355 Wis. 2d 618, 850 N.W.2d 42. Alternatively, the test is whether it is beyond a reasonable doubt that the error complained of did not contribute to the verdict. *Id.*

In "a very limited class of cases," constitutional error is exempt from harmless-error analysis. *State v Hansbrough*, 2011 WI App 79, ¶¶ 10–11, 334 Wis. 2d 237, 799 N.W.2d 887. Known as "structural errors," these are errors that so "seriously affect the fairness, integrity or public reputation of judicial proceedings and are so fundamental that they are considered per se prejudicial." *Id.* ¶ 10. Examples of the limited class of cases to which this exemption from harmless error applies include denial of counsel, denial of self-representation, denial of public trial, and racial discrimination in grand-jury selection. *Id.* ¶ 11. The supreme court has questioned, however, whether denial of the right to public trial is necessarily structural error and has determined that, in any event, the right may be forfeited by failure to object. *State v. Pinno*, 2014 WI 74, ¶¶ 52, 57, 356 Wis. 2d 106, 850 N.W.2d 207. Errors in sentencing may be structural. *State v. Travis*, 2013 WI 38, ¶ 57, 347 Wis. 2d 142, 832 N.W.2d 491. *But see State v. Coffee*, 2020 WI 1, ¶¶ 44, 51, 389 Wis. 2d 627, 937 N.W.2d 579 (holding that, even if sentencing court relied on false information, error can be harmless if there is sufficient other information relied on to show that conclusions and sentence would have been the same without the error). Unlike a harmless-error analysis, a structural-error analysis does not entail an overall view of the quantity of evidence presented at trial. Instead, the court determines whether the error is structural by evaluating the alleged error "in relation to the damage it causes to the trial mechanism." *State v. C.L.K. (In re Termination of Parental Rts. to S.M.H.)*, 2019 WI 14, ¶ 31, 385 Wis. 2d 418, 922 N.W.2d 807 (holding that finding of parental unfitness based on state's case without opportunity by parent to present defense constituted structural error). The majority of constitutional errors, however, are errors occurring during the presentation of evidence at trial;

these are not structural errors and are subject to a harmless-error analysis. *State v. Martin*, 2012 WI 96, ¶ 44, 343 Wis. 2d 278, 816 N.W.2d 270.

For certain types of constitutional error, the supreme court has set forth additional guidelines for assessing whether the error was harmless. For instance, in cases involving prosecutorial comment on the defendant's invocation of the right to silence, three factors should be considered: (1) the frequency of the error, (2) the nature of the state's case, and (3) the defense presented at trial. *Reichhoff v. State*, 76 Wis. 2d 375, 381, 251 N.W.2d 470 (1977). In cases involving erroneous admission of evidence, factors to consider in a harmless-error analysis include whether the evidence merely duplicated previously admitted, untainted evidence. *State v. Billings*, 110 Wis. 2d 661, 669, 329 N.W.2d 192 (1983). When a jury is exposed to extraneous information, another set of factors has been identified: the nature of the extraneous information and the circumstances under which it was brought to the jury's attention, the nature of the state's case, the defense presented at trial, and the connection between the extraneous information and the material issues in the case. *Poh*, 116 Wis. 2d at 530.

The trend seems to be that basic factors—the type of error, the state's case, and the nature of the defense—should be considered in all cases when assessing harmless error. Among the factors to be considered are the following: (1) the frequency of the error, (2) the importance of the erroneously admitted error, (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, (4) whether the erroneously admitted evidence duplicated untainted evidence, (5) the nature of the defense, (6) the nature of the state's case, and (7) the overall strength of the state's case. *See State v. Zdzieblowski*, 2014 WI App 130, ¶ 20, 359 Wis. 2d 102, 857 N.W.2d 622 (citing *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77). Ordinarily, the violation of a fundamental right, such as the right to counsel at a crucial stage of the trial, is not subject to a harmless-error analysis. *Anderson*, 2006 WI 77, ¶ 74, 291 Wis. 2d 673.

One factor that should always be considered in assessing any type of error is whether it was cured. For example, if a trial court recognizes an error, such as allowing inadmissible testimony, the common response is to strike or limit the testimony and admonish the jury to disregard it; the instructions to the jury at the close of testimony will typically reiterate the admonition. The general rule is that such steps are presumed to cure the prejudicial effect of erroneously admitted evidence. *E.g.*, *City of Milwaukee v. NL Indus.*, 2008 WI App 181, ¶ 69, 315 Wis. 2d 443, 762 N.W.2d 757.

When evidence has been erroneously admitted, error is also sometimes considered cured if the evidence merely tells the jury what it already knew from other properly admitted evidence. *State v. Medrano*, 84 Wis. 2d 11, 17, 267 N.W.2d 586 (1978); *State v. Doney*, 114 Wis. 2d 309, 313, 338 N.W.2d 852 (Ct. App. 1983); *Paper Mach. Corp. v. Nelson Foundry Co.*, 108 Wis. 2d 614, 624, 323 N.W.2d 160 (Ct. App. 1982). However, this type of error is actually harmless, not cured, because curing implies an actual remedial response aimed at a recognized error.

An important factor to consider in harmless-error analysis is whether the trial was to the court or to a jury. If trial was to the court, an admission of incompetent evidence is not a ground for reversal if sufficient competent evidence exists to sustain the court's findings. *Vargo v. Buban (In re Est. of Komarr)*, 68 Wis. 2d 473, 481, 228 N.W.2d 681 (1975). This would not be true, of course, if the trial court's reasoning revealed a reliance on the improper evidence. Additionally, because the circuit court is the trier of fact in trials to the court, error in refusing to admit evidence will be deemed harmless when the trial court has nonetheless reviewed the evidence and determined that it would have given it little or no weight. *See State v. Going Places Travel Corp.*, 2015 WI App 42, ¶ 34, 362 Wis. 2d 414, 864 N.W.2d 885.

When discussing the concept of plain error, previous editions of this book have stated that it cannot be deemed harmless. *See Virgil v. State*, 84 Wis. 2d 166, 190, 267 N.W.2d 852 (1978) ("[P]lain error … is ipso facto prejudicial.…"). Derived from the statutory provision that "plain errors affecting substantial rights" may be reviewed even absent an objection to the circuit court, Wis. Stat. § 901.03(4), the plain-error rule has generated confusion as to whether plain error can, nonetheless, be harmless. The short answer is that it can be harmless.

As noted by Chief Justice Beilfuss in his concurring opinion in *Virgil*, Wis. Stat. § 901.03(4) provides that review of otherwise-waived errors on grounds of plain error is discretionary, *Virgil*, 84 Wis. 2d at 195 (Beilfuss, C.J., concurring), and therefore the rule should be applied sparingly and only in cases in which a basic constitutional right has not been afforded. *Id.* This interpretation of *Virgil*, rather than the plurality's ipso facto prejudicial rule, was followed by the court of appeals in *State v. King*, 205 Wis. 2d 81, 88–91, 555 N.W.2d 189 (Ct. App. 1996). According to *King*, if the reviewing court can determine that the alleged error is harmless, there can be no basis for reversal based on plain error. *Id.* at 93–96.

While *King* recognized that the concept of plain error is still available to afford relief when the court concludes that "a defendant is convicted in a way inconsistent with the fairness and integrity of judicial proceedings," *id*. at 96, there is little doubt that plain error has been significantly curtailed as a counterpoint to harmless error.

There is no bright-line rule to determine when reversal is warranted in cases of plain error. *See State v. Jorgensen*, 2008 WI 60, ¶ 22, 310 Wis. 2d 138, 754 N.W.2d 77. Except, perhaps, for those rare cases referred to by Chief Justice Beilfuss in *Virgil*, courts do not invoke the plain-error doctrine when the error is shown to be harmless. *State v. Zdzieblowski*, 2014 WI App 130, ¶ 19, 359 Wis. 2d 102, 857 N.W.2d 102; *see also State v. Hurley*, 2015 WI 35, ¶ 4 n.4, 361 Wis. 2d 529, 861 N.W.2d 174 (stating that plain error is so fundamental that relief must be granted even in the absence of proper objection at trial).

Wisconsin's policy favoring the concept of harmless error is further seen in *State v. Armstrong*, 225 Wis. 2d 121, 121–22, 591 N.W.2d 604 (1999) (upon reconsideration, withdrawing language from previous decisions suggesting that concept of harmless error does not apply in appeals filed under Wis. Stat. § 971.31(10)).

Several cases have stated rules similar to harmless error, again based on the policy of upholding the trial court's result if that result would have been the same had the error not occurred. An appellate court may affirm the decision of a trial court for reasons other than those given by the trial court or presented by the parties. *Badtke v. Badtke*, 122 Wis. 2d 730, 735, 364 N.W.2d 547 (Ct. App. 1985). Similarly, an appellate court will affirm a trial court that reaches the right result for the wrong reasons. *de Nava v. DNR*, 140 Wis. 2d 213, 220, 409 N.W.2d 151 (Ct. App. 1987).

X. Individual Considerations in Decision to Appeal [§ 3.23]

Once an appealable event has occurred, counsel and the potential appellant must consider many variables before deciding to appeal. They must estimate the chances for a successful appeal by testing alleged errors against the appellate court's standard of review. An appeal based solely on the sufficiency of the evidence is less likely to succeed than one that alleges errors of law in addition to errors of fact. Another question to consider in evaluating an appeal is whether errors of law or misuses of discretion were prejudicial or whether the appellate court would likely label them harmless error.

In addition, the cost of appeal, including transcripts, attorney fees, and filing fees, must be weighed against the nature of the case. Too many appeals are taken when the cost of appeal approaches or exceeds the value of the underlying dispute. Can the client financially and emotionally afford the appeal?

The risks associated with an appeal must also be evaluated. For example, if the objective of an appeal is to obtain a new trial, the attorney should consider the possibility that the result of the new trial could be worse for the client than the original result; filing an appeal could also prompt a cross-appeal, with the same adverse consequences for the client.

An appeal will take time, and the potential effects of the delay must be considered. Would it be better to face an adverse judgment now or 12 months from now? An attorney considering taking an appeal should try to estimate how long the appeal might take. Would expediting the appeal by accepting fast-track disposition with its shorter briefs and opinions be advisable? If unsuccessful in the court of appeals, will review be sought in the supreme court? Does the case involve the sort of significant legal issue that would be likely to reach the supreme court no matter what the result in the court of appeals? On the other hand, if the case presents a significant issue of law, what is the chance of successfully moving to bypass the court of appeals?

An attorney should also ask: Is the case the right one to appeal to establish or change a point of law? Or is the case likely to cause the appellate court to reject the argument and create unwelcome precedent? Is the court likely to be sympathetic to the client? Sometimes courts will gloss over legal inadequacies of a case to do justice through a result-oriented decision.

Before taking an appeal, an attorney should also consider whether he or she has the time or expertise to prepare the appeal. Referring the appeal to another attorney may be desirable. *See* Kimberly Alderman, *Seeing the Forest Through the Trees: Should Lawyers Handle Their Own Appeals?*, Wis. Law., June 2014, at 49.

Finally, the attorney should investigate alternatives to appeal, including settlement and postjudgment motions in the circuit court. Whichever course is selected, however, it is imperative to be aware of the time limits for appealing. As a general rule, the right to

appeal is lost forever if not timely exercised. *See infra* § 5.6.

XI. Discretionary Reversal [§ 3.24]

Both the court of appeals, *see* Wis. Stat. § 752.35, and the supreme court, *see* Wis. Stat. § 751.06, have the power of discretionary reversal. Although these statutes are identical in all significant respects, the supreme court has greater discretionary reversal authority than the court of appeals.

The power vested in the court of appeals by Wis. Stat. § 752.35 is identical to the power vested in the supreme court by Wis. Stat. § 751.06. *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). The discretionary reversal authority of both courts includes not only the power to reverse and remand, but also the power to direct that the circuit court enter a specific judgment on remand. *Gamroth v. Village of Jackson*, 215 Wis. 2d 251, 264, 571 N.W.2d 917 (Ct. App. 1997). The supreme court noted, however, that it has additional common-law powers of discretionary reversal that the court of appeals does not have, in particular, the right to reverse when a waived error goes to the "integrity of the fact finding process." *Vollmer*, 156 Wis. 2d at 14–15.

Thus, the court of appeals' discretionary reversal authority is limited to the two grounds set forth in the statutes: when the real controversy has not been fully tried, and when it is probable that justice has miscarried. Under the first ground, it is not necessary for the court to conclude that the outcome would be different on retrial. *Id.* at 19. Under the second ground, the court must make a finding of substantial probability of a different result on retrial. *Id.*

The ability of an appellate court to exercise discretionary reversal based on the miscarriage-of-justice ground does not allow the court to simply reweigh the evidence and conclude that it is probable that a retrial would likely produce a different result. *See State v. Kucharski*, 2015 WI 64, ¶ 11, 363 Wis. 2d 658, 866 N.W.2d 697. It must first review the evidence under the proper standard of review, giving proper deference to findings of fact. *Id.* According to the *Kucharski* dissent, this holding essentially strips the appellate courts of discretionary power in those rare cases in which reversal is nonetheless necessary to remedy a grave injustice and accomplish the ends of justice. *Id.* ¶¶ 58–59 (Bradley, A.W., J., dissenting). The supreme court has reaffirmed its narrow view of the court of appeals' discretionary review power, noting that the court of appeals cannot ignore the issues raised on appeal and shortcut directly to Wis. Stat. § 752.35. *See State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258.

Counsel should beware of requesting discretionary reversal. It is appropriate only in the exceptional case. *State v. Kaminski (In re Commitment of Kaminski)*, 2009 WI App 175, ¶ 28, 322 Wis. 2d 653, 777 N.W.2d 654. Even then, the court uses its power sparingly and with great caution. *State v. Wery*, 2007 WI App 169, ¶ 21, 304 Wis. 2d 355, 737 N.W.2d 66. Moreover, a request for such relief sometimes may be viewed as an admission that other issues raised on appeal have little merit. Finally, simply restating all previous arguments and urging that their cumulative weight warrants discretionary reversal is unlikely to achieve success. "Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; '[z]ero plus zero equals zero.'" *State v. Echols*, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989) (quoting *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976)).

Supplement Chapter 4
Appeal as of Right to the Court of Appeals

Book section supplemented: 4.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

4.1 Scope

Page 2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-19 (Oct. 6, 2023).

Chapter 4
Appeal as of Right to the Court of Appeals

I. Scope
[§ 4.1]

This chapter covers the prerequisites for taking a civil appeal as of right to the court of appeals. The procedure for actually taking the appeal is described in chapter 5, *infra*; the procedure for one-judge appeals as of right under Wis. Stat. § 752.31(2) is described in chapter 20, *infra*. This chapter does not address the procedure for appeals in proceedings related to parental consent before performance of an abortion set forth in Wis. Stat. § 809.105, enacted in 1992. Thus far, not a single appeal has been taken under this procedure. [1]

Wis. Stat. § 808.03(1) allows an appeal as a matter of right from a final order or judgment of the circuit court. The statute defines a *final order* or *final judgment* as

> a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding, and that is one or more of the following:
>
> (a) Entered in accordance with s. 806.06(1)(b) or 807.11(2).
>
> (b) Recorded in docket entries in ch. 799 cases.
>
> (c) Recorded in docket entries in traffic regulation cases prosecuted in, or following a decision in a municipal court, appealed to, circuit court if a person convicted of a violation may be ordered to pay a forfeiture.
>
> (d) Recorded in docket entries in municipal ordinance violation cases prosecuted in, or following a decision in a municipal court, appealed to, circuit court.

The statute contains a number of concepts, some much more important than others. For example, it makes little difference whether an appeal is from an order or judgment, or from an action or special proceeding. It is essential, however, that the document being appealed has been entered or recorded and is final. Three exceptions to the finality rule are discussed in section 4.4, *infra*.

This chapter emphasizes the concepts of entry and finality. Time for appeal is addressed in chapter 5, *infra*.

II. Judgments or Orders [§ 4.2]

Traditionally, the distinction between a judgment and an order has been that the former decided an action, while the latter decided a special proceeding. *See State ex rel. Hanson v. Department of Health & Soc. Servs.*, 64 Wis. 2d 367, 378, 219 N.W.2d 267 (1974). Wis. Stat. § 806.01 currently reflects this distinction by defining a *judgment* as "the determination of the action." The significance of the distinction between judgments and orders is undermined, however, by Wis. Stat. § 801.01, which provides that for the general purposes of civil procedure, *action* includes "special proceeding," unless a separate procedure is provided for the

special proceeding. The rules of appellate procedure do not specify a separate procedure for appeals from either actions or special proceedings.

It is of little significance whether the order or judgment appealed from is properly labeled as such. An appellate court is not bound by the label of a document and will look to the document itself to determine its significance. *Harder v. Pfitzinger*, 2004 WI 102, ¶ 13, 274 Wis. 2d 324, 682 N.W.2d 398. Thus, an appeal may be taken from a final disposition of an action even if that disposition is labeled as an order rather than as a judgment. *Id.* All that matters is that the disposition is in fact final.

By the same reasoning, appeals may also be taken from documents that are not labeled either as an order or as a judgment but that have the effect of a final order or judgment. For example, although appeals generally cannot be taken from circuit court "decisions," *see Wick v. Mueller*, 105 Wis. 2d 191, 193–94, 313 N.W.2d 799 (1982), if a circuit court memorandum opinion or decision in fact constitutes a final order or judgment of the court, it is appealable. *See, e.g.*, *Fredrick v. City of Janesville*, 92 Wis. 2d 685, 687, 285 N.W.2d 655 (1979).

Despite these exceptions to the general rule, attorneys are well advised to heed the rules limiting appeals to orders and judgments and work with the circuit court to ensure that the action or special proceeding receives a final disposition by an order or judgment that is clearly recognizable as such. Attorneys should not attempt to construe decisions as orders or judgments. Rather, they should ensure that an order or judgment embodying the decision is rendered and entered before appealing. Under Wis. Stat. § 806.06(4), any party may cause a judgment to be rendered and entered.

Appeal as of right may be taken only from an order or judgment of a *circuit court*. Wis. Stat. § 808.03(1). An order of a "judge" requiring the filing of a criminal complaint pursuant to Wis. Stat. § 968.02(3) is not an order of a circuit court and therefore is not appealable. *Gavcus v. Maroney*, 127 Wis. 2d 69, 377 N.W.2d 200 (Ct. App. 1985). *But see Schoenhofen v. Department of Transp.*, 231 Wis. 2d 508, 519, 526–27, 605 N.W.2d 249 (Ct. App. 1999) (holding that appeal from order of judge, withdrawing assignment of case to county condemnation commission, was appeal from final order entered by court). For the same reason, appeal cannot be taken from a court commissioner's order. *State v. Trongeau*, 135 Wis. 2d 188, 192–94, 400 N.W.2d 12 (Ct. App. 1986).

III. Finality [§ 4.3]

A. Introduction [§ 4.4]

An understanding of the concept of finality is essential to understanding Wisconsin appellate practice and procedure. Finality is central to the jurisdiction of the court of appeals and to the reorganized court system. As previously noted, the only orders and judgments that may be appealed as of right are final orders and judgments. Wis. Stat. § 808.03(1). The multitude of orders and judgments formerly appealed as of right to the supreme court have now been replaced by a single category appealable as of right to the court of appeals. All other orders and judgments are appealable only by permission of the court.

The test for finality set forth in Wis. Stat. § 808.03(1) applies to all appeals as of right, including criminal appeals and appeals by the state. *See State v. Rabe*, 96 Wis. 2d 48, 57, 291 N.W.2d 809 (1980). An order consolidating multiple counts of homicide into a single count is not a final, appealable order. *Id.* at 58–89. An order waiving juvenile jurisdiction is also nonfinal. *State ex rel. A.E. v. Green Lake Cnty. Cir. Ct.*, 94 Wis. 2d 98, 105a, 288 N.W.2d 125, 292 N.W.2d 114 (1980).

Three exceptions to the finality rule must be noted: First, Wis. Stat. § 813.025(3) provides a right to appeal in cases in which an order suspends or restrains enforcement of a state statute. In such cases—for example, a temporary injunction—the order is immediately appealable. Second, Wis. Stat. § 809.104(2) provides a right to appeal from nonfinal orders relating to an electronics and information technology manufacturing zone. Third, Wis. Stat. § 803.08(11) allows appeals from certification or decertification orders entered in class actions.

With the three exceptions just noted, the Wisconsin appellate courts strictly adhere to the concept of finality to carry out legislative policies promoting the integrity of circuit court proceedings, to avoid interruption and prevent piecemeal appeals, and to reduce the burden on the court of appeals by limiting the number of appeals to one appeal per case. *Wick v. Mueller*, 105 Wis. 2d 191, 200, 313 N.W.2d 799 (1982); *Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 395–96, 294 N.W.2d 15 (1980). For example, although the paternity statutes contemplate a bifurcated proceeding—first to determine paternity and second to determine

custody, placement, and support—an appeal cannot be taken as of right from the paternity determination in advance of a final ruling on the remaining issues. *State v. Gene R. (In re Paternity of Jaime M.E.)*, 196 Wis. 2d 789, 792, 540 N.W.2d 217 (Ct. App. 1995).

Consistent with the requirement of finality and the policy favoring only one appeal as of right in a case, parties may not manufacture artificial issues for appeal. See *Lassa v. Rongstad*, 2006 WI 105, ¶ 35, 294 Wis. 2d 187, 718 N.W.2d 673 (citing *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 269, 569 N.W.2d 45 (Ct. App. 1997)), for the proposition that a party cannot, by stipulating to a conditional entry of judgment, obtain a mandatory appeal from an otherwise-nonfinal order. Stipulations otherwise leading to a final judgment do not necessarily create a manufactured issue. *See id.* Compare *Lassa* with *Dyer v. Law*, 2007 WI App 137, ¶ 8, 302 Wis. 2d 207, 733 N.W.2d 328, in which the court distinguished *Lassa* and dismissed an appeal on the ground that the stipulation created a conditional final order that could have resulted in new litigation and a second appeal.

B. Definition: Final Order or Judgment [§ 4.5]

1. In General [§ 4.6]

What is a final order or judgment? Wis. Stat. § 808.03(1) provides a simple test: a *final judgment* or *final order* is one that "disposes of the entire matter in litigation as to one or more of the parties." The confusion in understanding this definition results primarily from attorneys who refuse to give it a commonsense interpretation based on the plain meaning of the language.

One method of defining final orders and judgments is to distinguish them from their nonfinal counterparts—interlocutory judgments and intermediate orders. An interlocutory judgment substantially disposes of a claim on its merits but leaves an account to be settled or a condition to be performed to fully determine the rights of the parties. *Shuput v. Lauer*, 109 Wis. 2d 164, 169–70, 325 N.W.2d 321 (1982). An intermediate order settles only ancillary matters.

But the most fruitful method of understanding the meaning of finality in Wis. Stat. § 808.03(1) is to ascertain whether the order or judgment disposes of "all … substantive issues in the litigation" as to one or more of the parties. *See Harder v. Pfitzinger*, 2004 WI 102, ¶ 2, 274 Wis. 2d 324, 682 N.W.2d 398. Whether a judgment or order is final presents a question of law that the appellate court addresses de novo. *Contardi v. American Fam. Mut. Ins. Co.*, 2004 WI App 104, ¶ 4, 273 Wis. 2d 509, 680 N.W.2d 828. In fact, it is the duty of an appellate court, notwithstanding that no party has raised the issue, to take notice of its jurisdiction and dismiss the appeal if it is taken from a nonfinal disposition. *McConley v. T.C. Visions, Inc.*, 2016 WI App 74, ¶ 4, 371 Wis. 2d 658, 885 N.W.2d 816.

The continuing confusion over whether a document disposes of the entire matter in litigation led the supreme court to declare that a document intended to be final and entered by the circuit court must contain a statement on its face that it is final for purposes of appeal. *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶¶ 4, 45, 49, 299 Wis. 2d 723, 728 N.W.2d 670; *Tyler v. RiverBank*, 2007 WI 33, ¶¶ 25–26, 299 Wis. 2d 751, 728 N.W.2d 686. Absent such a statement, appellate courts will liberally construe ambiguities to preserve the right to appeal. *Wambolt*, 2007 WI 35, ¶¶ 4, 46, 299 Wis. 2d 723; *Tyler*, 2007 WI 33, ¶ 26, 299 Wis. 2d 751; *see also infra* § 4.15. On the other hand, the absence of a statement of finality cannot be used to create ambiguity or nonfinality when it is clear that the order or judgment otherwise disposes of the entire matter in litigation as to one or more parties. *Admiral Ins. Co. v. Paper Converting Mach. Co.*, 2012 WI 30, ¶ 29, 339 Wis. 2d 291, 811 N.W.2d 351.

2. Disposition of Entire Matter in Litigation [§ 4.7]

A final disposition resolves the dispute, precludes further hearing, and completely settles the rights of the parties. *See Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 396–97, 294 N.W.2d 15 (1980).

To determine finality, the attorney should examine a judgment or order to determine whether it leaves anything to be done in the circuit court. Does the order or judgment resolve all substantive issues in the case as to one or more parties? Does it leave nothing to be done except taxing of costs and disbursements and enforcement by execution? If so, the order or judgment is final. *See Harder v. Pfitzinger*, 2004 WI 102, ¶ 17, 274 Wis. 2d 324, 682 N.W.2d 398; *see also McConley v. T.C. Visions, Inc.*, 2016 WI App 74, ¶¶ 1, 5, 9, 371 Wis. 2d 658, 885 N.W.2d 816 (holding that remaining issue of attorney fees, whether awarded by fee-shifting statute or contract, is in nature of taxation of costs and does not render nonfinal the underlying disposition of the merits); *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 2003 WI App 190, ¶¶ 24–25, 267 Wis. 2d 233, 670 N.W.2d 74 (holding that

appeal from final order includes subsequent order taxing costs), *aff'd in part*, *rev'd in part on other grounds*, 2004 WI 92, 273 Wis. 2d 577, 682 N.W.2d 839. If not, the order or judgment may be appealed only with permission of the appellate court.

To be final, an order or judgment need not separately discuss each claim raised; it simply must dispose of the entire matter in litigation as to one or more parties as a matter of substantive law. *Contardi v. American Fam. Mut. Ins. Co.*, 2004 WI App 104, ¶ 8, 273 Wis. 2d 509, 680 N.W.2d 828.

Although a strict application of the finality test requiring the termination of the entire matter in litigation is generally helpful in determining whether the matter is final and appealable as of right, there are some cases in which applying the rule is of little help. In foreclosure actions, for example, the supreme court has concluded that a judgment of foreclosure is final, even though it is followed by a sale and judicial confirmation; the proceedings after judgment in this situation are characterized as an execution of the judgment. *Shuput v. Lauer*, 109 Wis. 2d 164, 172, 325 N.W.2d 321 (1982). This is true in land-contract foreclosures as well as in mortgage foreclosures. *Hackmann v. Behm*, 207 Wis. 2d 437, 443–44, 558 N.W.2d 905 (Ct. App. 1996). Relying on *Shuput*, the court of appeals determined that a judgment resolving the merits of a federal civil rights action under 42 U.S.C. § 1983, but leaving open a claim for attorney fees under 42 U.S.C. § 1988, was final and appealable. *ACLU v. Thompson*, 155 Wis. 2d 442, 447, 455 N.W.2d 268 (Ct. App. 1990), *overruled in part on other grounds by Edland v. Wisconsin Physicians Serv. Ins. Corp.*, 210 Wis. 2d 638, 648, 563 N.W.2d 519 (1997); *see also Campbell v. Campbell*, 2003 WI App 8, ¶ 10, 259 Wis. 2d 676, 659 N.W.2d 106 (holding that order resolving issue of postdivorce child support and arrearages is final, even if order leaves open request for attorney fees). This means, therefore, that an appeal from the determination of the merits in the underlying case must be taken in timely fashion from the entry of the order deciding that portion of the case. An appeal from the fee portion may prove to be untimely regarding the previous issues. *See Laube v. City of Owen*, 209 Wis. 2d 12, 561 N.W.2d 785 (Ct. App. 1997).

On the other hand, an order terminating review of an administrative decision is final and appealable as of right, even if it remands for further proceedings, because administrative proceedings are not matters "in litigation." *Bearns v. Department of Indus., Lab. & Hum. Rels.*, 102 Wis. 2d 70, 76, 306 N.W.2d 22 (1981). *But see Citizens for U, Inc. v. DNR*, 2010 WI App 21, ¶ 19, 323 Wis. 2d 767, 780 N.W.2d 194 (holding that order remanding to agency for further proceedings was not final when remand was for very specific issues and order contemplated further litigation in the circuit court on such issues). More difficult to understand is the court's conclusion in one case that an appeal from an order granting an injunction, but not completely terminating a party's role in the litigation, could be taken because the appellant's participation in the remaining matters at trial was "only nominal." *Town of Fitchburg v. City of Madison (In re Incorporation of Town of Fitchburg)*, 98 Wis. 2d 635, 649, 299 N.W.2d 199 (1980).

3. As to One or More Parties [§ 4.8]

An important qualifier in the requirement that a final order or judgment dispose of the entire matter in litigation is that it do so as to one or more parties. Thus, a judgment or order that disposes of the matter as to one party is final even though issues remain to be resolved among other parties to the action. For example, in cases involving multiple parties, the litigation might continue, but an order dismissing one of the parties would be a final, appealable order. An order dismissing a complaint as to two defendants but remanding a third defendant for further proceedings is not final as to the third defendant. *Culbert v. Young*, 140 Wis. 2d 821, 827, 412 N.W.2d 551 (Ct. App. 1987); *see also Westport Sand & Gravel Co. v. Holdmann*, 159 Wis. 2d 613, 464 N.W.2d 676 (Ct. App. 1990). Dismissal of a complaint is not final when both parties continue in the lawsuit, even though they no longer have claims or counterclaims against each other. *Duncan v. State Farm Mut. Ins. Co.*, 177 Wis. 2d 496, 498, 502 N.W.2d 874 (Ct. App. 1993).

Note. Cases that involve multiple issues may also present difficulty. Usually, the resolution of some, but not all, of the issues does not dispose of the entire matter in litigation if other issues remain to be resolved between the parties. If a counterclaim remains pending, a judgment dismissing the main claim is not appealable as of right. *Brownsell v. Klawitter*, 99 Wis. 2d 407, 410, 299 N.W.2d 292 (Ct. App. 1980), *aff'd*, 102 Wis. 2d 108, 306 N.W.2d 41 (1981). Similarly, if a complaint alleges multiple causes of action, the dismissal of one claim will not result in a final, appealable judgment or order; an appeal cannot be taken until all claims are disposed of.

C. Nonfinal Denials of Motions [§ 4.9]

As a general rule, a judgment or order that denies a motion is not final. Thus, a judgment or order *denying* any of the following motions is not final and therefore not appealable as of right:

1. Motion to dismiss for failure to state a claim upon which relief may be granted, *Grulkowski v. Department of Transp.*, 97 Wis. 2d 615, 294 N.W.2d 43 (Ct. App. 1980);

2. Motion to dismiss for lack of personal jurisdiction, *Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 294 N.W.2d 15 (1980);

3. Motion for appointment of counsel, *Brotzman v. Brotzman*, 91 Wis. 2d 335, 283 N.W.2d 600 (Ct. App. 1979);

4. Motion for stay of proceedings, *Mayer v. Mayer*, 91 Wis. 2d 342, 347 n.2, 283 N.W.2d 591 (Ct. App. 1979);

5. Motion for substitution of judge, *Clark v. State*, 92 Wis. 2d 617, 286 N.W.2d 344 (1979);

6. Motion to challenge jury array, *State v. Coble*, 95 Wis. 2d 717, 718, 291 N.W.2d 652 (Ct. App. 1980), *aff'd*, 100 Wis. 2d 179, 301 N.W.2d 221 (1981);

7. Motion for change of venue, *Aparacor, Inc. v. Department of Indus., Lab. & Hum. Rels.*, 97 Wis. 2d 399, 293 N.W.2d 545 (1980);

8. Motion for bail pending appeal, *State v. Whitty*, 86 Wis. 2d 380, 272 N.W.2d 842 (1978);

9. Pretrial motion to dismiss on double-jeopardy grounds, *State v. Jenich*, 94 Wis. 2d 74, 288 N.W.2d 114, 292 N.W.2d 348 (1980); or

   Note. The Wisconsin Supreme Court has recommended that the court of appeals review such orders in the exercise of its power of discretionary review pursuant to Wis. Stat. § 809.50. *See infra* § 9.6.

10. Motion to join additional defendant, *Rice v. Fiern*, 108 Wis. 2d 454, 322 N.W.2d 481 (Ct. App. 1982).

D. Special Proceedings [§ 4.10]

Although orders denying the preceding motions are nonfinal and not appealable as of right, an order denying a petition to intervene is final because it terminates a special proceeding. *See, e.g.*, *Milwaukee Sewerage Comm'n v. DNR*, 104 Wis. 2d 182, 311 N.W.2d 677 (Ct. App. 1981). In this connection, a word should be said about special proceedings. As previously noted, the distinction between actions and special proceedings is normally of little significance to appellate attorneys. *See supra* § 4.2. Attorneys should be aware, however, that special proceedings often arise in the context of an ongoing action and an order terminating a special proceeding must be separately appealed. Special proceedings are related to or connected with the underlying proceeding but present a "separate and distinct" issue. *See L.G. v. Aurora Residential Alternatives, Inc.*, 2019 WI 79, ¶¶ 18–19, 387 Wis. 2d 724, 929 N.W.2d 590 (holding that order denying motion to compel arbitration and to stay proceedings so that arbitration agreement could be enforced was final order entered in special proceeding separate from underlying civil damages action).

The archetypal example of a special proceeding is a contempt proceeding. *See Kroll v. Bartell (In re Civil Contempt of Kroll)*, 101 Wis. 2d 296, 302, 304 N.W.2d 175 (Ct. App. 1981). In such proceedings, the appealable event is the finding of contempt and pronouncement of sentence. If an appeal of the finding or sentence is desired, it must be taken from the finding and sentence—not from the final disposition of the underlying action or from the order executing sentence upon failure of the contemnor to purge the contempt. Other examples of orders terminating special proceedings that must be appealed notwithstanding the continuation of the underlying proceedings are orders denying a claim against an estate or orders determining which of several of a decedent's wills to admit to probate. Probate proceedings are special proceedings. *Goldstein v. Goldstein (In re Est. of Goldstein)*, 91 Wis. 2d 803, 810, 284 N.W.2d 88 (1979). Because probate is a series of special proceedings, there can be multiple appealable orders in the same case. *See Sanders v. Estate of Sanders (In re Est. of Sanders)*, 2008 WI 63, ¶¶ 27–28, 310 Wis. 2d 175, 750 N.W.2d 806. An order forfeiting bail is a final, appealable order entered in a civil special proceeding arising out of a criminal case. *State v. Wickstrom*, 134 Wis. 2d 158, 164, 396 N.W.2d 188 (1986). A competency proceeding connected to an underlying criminal matter is a special proceeding. *State v. Scott*, 2018 WI 74, ¶ 33, 382 Wis. 2d 476, 914 N.W.2d 141 (holding that involuntary medication order entered in connection with postconviction matter was final order terminating special competency proceeding). A special proceeding may be

commenced by a motion. *Wengerd v. Rinehart*, 114 Wis. 2d 575, 582, 338 N.W.2d 861 (Ct. App. 1983). A motion for relief from judgment under Wis. Stat. § 806.07 commences a special proceeding. *Id.*

E. Orders Granting Motions [§ 4.11]

Although it is generally true that orders denying motions are not final, it does not necessarily follow that orders granting motions are final. For example, an order granting a new trial is not final because, by its very terms, it continues the litigation rather than ends it. *Earl v. Marcus*, 92 Wis. 2d 13, 16, 284 N.W.2d 690 (Ct. App. 1979). The same is true of orders granting motions to reopen judgments. *See King v. Moore*, 95 Wis. 2d 686, 291 N.W.2d 304 (Ct. App. 1980); *see also Wellens v. Kahl Ins. Agency, Inc.*, 145 Wis. 2d 66, 70, 426 N.W.2d 41 (Ct. App. 1988) (order granting motion to vacate judgment is not final because it results in further circuit court proceedings). Postjudgment orders requiring the immediate transfer of real estate may be considered final notwithstanding the pendency of other postjudgment matters. *See Orlando Residence, Ltd. v. Nelson*, 2013 WI App 81, ¶¶ 11, 14, 348 Wis. 2d 565, 834 N.W.2d 416.

Comment. *Orlando* should be construed narrowly, limited to "unique postjudgment proceedings where far-reaching orders do not end the proceedings." *Id.* ¶ 11. Generally, the finality of orders in postjudgment proceedings should be held to the standard of finality for orders entered in special proceedings. *See supra* § 4.10.

F. Denials of Postjudgment Motions [§ 4.12]

Postjudgment orders denying motions to reconsider, vacate, or modify are appealable, but only as to issues raised for the first time in the postjudgment motion. This limitation is designed to promote the finality of judgments and to discourage the use of postjudgment motions to extend the time in which to appeal a judgment. Therefore, issues that could have been raised on an appeal from a judgment if no postjudgment motion had been filed cannot be raised on an appeal from an order denying a postjudgment motion. *VerHagen v. Gibbons*, 55 Wis. 2d 21, 25–26, 197 N.W.2d 752 (1972). Consistent with the policy encouraging parties to seek reconsideration in the circuit court as an alternative to appeal (*see infra* § 5.7), the appellate courts have adopted a liberal philosophy for determining whether an order denying reconsideration raises new issues and is, therefore, appealable. *See State v. Edwards*, 2003 WI 68, ¶ 12, 262 Wis. 2d 448, 665 N.W.2d 136.

Motions by which parties call upon the family court's continuing jurisdiction to revise or modify previous orders or judgments have the effect of creating a new action. *See* Wis. Stat. § 767.001(1)(i). Accordingly, an order denying one of these postjudgment motions is a final order terminating an action.

G. Other Considerations for Determining Finality [§ 4.13]

1. Contemporaneous Comments of Circuit Court [§ 4.14]

Although subsequent events will not determine a document's finality, an appellate court may look to the circuit court's *contemporaneous* comments. *See State v. Wright*, 143 Wis. 2d 118, 123–24, 420 N.W.2d 395 (Ct. App. 1988). In *Wright*, the court of appeals reviewed a hearing transcript and concluded from the court's oral decision that the circuit court contemplated further proceedings. Thus, the circuit court's written order was not final even though the order itself purported to finally dispose of the entire matter in litigation. *Id.* Ambiguous contemporaneous comments, however, do not provide a basis for interpreting the finality of a written order or judgment. *Contardi v. American Fam. Mut. Ins. Co.*, 2004 WI App 104, ¶ 6, 273 Wis. 2d 509, 608 N.W.2d 828.

2. Identification of Last Document Disposing of Matter [§ 4.15]

The document appealed from must be more than a decision; it must explicitly dismiss or adjudge the entire matter. *See Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶ 45, 299 Wis. 2d 723, 728 N.W.2d 670. An appealable order or judgment must state, on its face, that it is a final and appealable disposition. *Id.*

A circuit court may issue several documents that express its decision disposing of an entire matter in litigation. For example, it is not uncommon in a single case for a circuit court to issue a memorandum decision, findings of fact and conclusions of law, an order for judgment, and a judgment. Ideally, these documents would each be clearly delineated and limited in scope. The memorandum

decision and the findings and conclusions would represent the circuit court's analysis and decision. The order for judgment would direct that a judgment be prepared reflecting the final decision. Then the judgment would finally dispose of the entire matter. In actual practice, however, the distinctions between these documents often become blurred, and it can be difficult to determine whether a circuit court will, or should, issue another document to express its final disposition.

The confusion with identifying the final disposition in such cases could thus result in a problem with premature appeals from nonfinal orders—a problem that was rectified, to a large extent, by the supreme court's creation in 1992 of Wis. Stat. § 808.04(8), which provides that entry of a final order after the one erroneously appealed from corrects any jurisdictional defects. In such an otherwise-premature appeal, the notice of appeal or intent to appeal from the premature order is deemed to be from the subsequent, final order.

The *Wambolt* holding should help resolve much, if not most, of the confusion over which document to appeal from. The *Wambolt* decision does not, however, resolve the problem of determining whether the document actually is final and appealable. In the absence of a clear statement of finality, appellate courts are directed to liberally construe ambiguities to preserve the right to appeal. *Wambolt*, 2007 WI 35, ¶ 46, 299 Wis. 2d 723. As noted in *Wambolt*, there undoubtedly will be orders or judgments entered that do not contain statements of finality but are, in fact, final dispositions, and there may be documents that contain statements of finality but are not, in fact, final dispositions. *Id.* ¶ 46 & n.19; *see, e.g.*, *Werner v Hendree*, 2011 WI 10, ¶ 63, 331 Wis. 2d 511, 795 N.W.2d 423 (concluding that order was not final despite statement in order that it was final for purpose of filing appeal). This only heightens the need for attorneys and circuit courts to be sensitive to appeal issues when drafting orders and judgments.

Therefore, even after *Wambolt*, case law concerning whether a document is or is not the final disposition continues to be relevant.

Recourse cannot be had to subsequent events to determine the finality of a document. *Fredrick v. City of Janesville*, 92 Wis. 2d 685, 687–88, 285 N.W.2d 655 (1979). In *Fredrick*, the supreme court refused to consider the subsequent entries of an order for judgment and judgment. The supreme court held that the order appealed from, an order dismissing the action on the merits with prejudice and with costs, was final because the circuit court did not contemplate any further order or judgment. *Id.* at 688–89. On the other hand, in *Radoff v. Red Owl Stores, Inc.*, 109 Wis. 2d 490, 493–94, 326 N.W.2d 240 (1982), an order granting a motion for summary judgment and ordering that judgment be entered was held to contemplate later entry of an actual judgment and thus was not final.

The prohibition against determining finality by looking to subsequent events may have been weakened, however, by the *Wambolt* requirement that a final, appealable order contain a clear statement of finality. *See Black v. City of Kenosha Hous. Auth.*, No. 2009AP2368, 2009 WL 5126232, ¶ 7 (Wis. Ct. App. Dec. 30, 2009) (unpublished opinion not citable per Wis. Stat. § 809.23(3)) (holding that when an otherwise-final order did not contain a clear statement of finality, it was permissible to look to a subsequently entered order containing that statement as the final order for appeal purposes). On the other hand, the absence of a statement of finality cannot be used to create ambiguity or nonfinality when it is clear that the order or judgment otherwise disposes of the entire matter in litigation as to one or more parties. *Admiral Ins. Co. v. Paper Converting Mach. Co.*, 2012 WI 30, ¶ 29, 339 Wis. 2d 291, 811 N.W.2d 351.

Moreover, when considering finality, an appellate court is not bound by the label on the document. *Harder v. Pfitzinger*, 2004 WI 102, ¶ 15, 274 Wis. 2d 324, 682 N.W.2d 398. Even a document labeled as a memorandum decision may be construed as a final judgment or order if it, in fact, constitutes the final ruling of the circuit court. *Fox v. Department of Health & Soc. Servs.*, 112 Wis. 2d 514, 517 n.1, 334 N.W.2d 532 (1983). *But see Wick v. Mueller*, 105 Wis. 2d 191, 193–94, 313 N.W.2d 799 (1982). On petition for review of a circuit court decision that was certified by the court of appeals, the supreme court questioned the propriety of the court of appeals' allowing an appeal from a memorandum decision as a matter of right but declined to hold that the court of appeals had no jurisdiction because the court of appeals does have discretionary authority to consider appeals from nonfinal orders and judgments. *Vogt v. Schroeder*, 129 Wis. 2d 3, 24, 383 N.W.2d 876 (1986).

It is inadvisable to appeal from a memorandum decision or a document labeled "order for judgment." The general rule is that neither of these documents is appealable. *See Sprangers v. Philippi*, 52 Wis. 2d 403, 404–05, 190 N.W.2d 136 (1971).

Attorneys should also recognize that an appellate court's refusal to be bound by the label on a document, often used to salvage an appeal, may just as easily be used to torpedo an appeal. Thus, an appeal from a document labeled "judgment," which would ordinarily indicate finality, will be dismissed if the document contains language such as "let judgment be entered," showing that the

so-called judgment was in fact an order for judgment that contemplated subsequent entry of a judgment. On the other hand, the appellate courts had been unwilling to defeat an otherwise-proper appeal from a final judgment or order by looking back at an earlier memorandum decision to see whether it could be construed as a final order or judgment.

At least that had been the case until the release of *Harder* in 2004, which stated that the test of finality was whether the document "disposes of all … substantive issues in the litigation, as to one or more parties." *Harder*, 2004 WI 102, ¶ 2, 274 Wis. 2d 324. Relying on *Harder*, the court of appeals later held (in *Wambolt*) that an appeal taken from an order dismissing a party from an action was untimely, and that the appeal should have been taken from an earlier memorandum decision that decided all substantive issues. *Wambolt*, 2007 WI 35, ¶¶ 32–33, 299 Wis. 2d 723 (discussing court of appeals' rationale). The supreme court disagreed and reversed, holding that to finally "dispose" of the matter in litigation, there must be more than a decision; "the circuit court must act by explicitly dismissing or adjudging the entire matter in litigation as to one or more parties." *Id.* ¶ 34.

Example. If this test is applied to a document entitled "Memorandum Decision," the attorney should remember that the title of the document is not controlling. If the document contains an "explicit" statement that the matter is finally disposed of by, for example, stating that the complaint "is dismissed," it is a final, appealable disposition. If, however, the decision simply contains an explanation of the circuit court's reasoning as to why the complaint is defective, without a statement of disposition, it is not final. In that case, a subsequent order or judgment with an explicit disposition must be entered before an appeal can be taken.

IV. Entry [§ 4.16]

A. In General [§ 4.17]

An order or judgment cannot be appealed unless it has been entered. Wis. Stat. § 808.03(1). A judgment or order is entered by filing it in the office of the clerk of the circuit court. Wis. Stat. §§ 806.06(1)(b), 807.11(2). The entry, or filing, of a judgment is distinguished from the oral granting of a circuit court judgment and from the rendering or signing of a judgment by the circuit court. Wis. Stat. § 806.06(1). These distinctions also apply to orders. Wis. Stat. § 807.11.

B. Writing and Signature Requirements [§ 4.18]

Before an order or judgment can be entered, it must, of course, be reduced to writing. Therefore, an appeal cannot be taken unless the order or judgment is in writing and has been filed with the clerk of the circuit court. *Ramsthal Advert. Agency v. Energy Miser, Inc.*, 90 Wis. 2d 74, 75–76, 279 N.W.2d 491 (Ct. App. 1979). Oral orders must be reduced to writing before an appeal may be taken. *Helmrick v. Helmrick*, 95 Wis. 2d 554, 556, 291 N.W.2d 582 (Ct. App. 1980). A transcript of an oral ruling does not constitute an appealable, written order. *State v. Dylan S. (In the Int. of Dylan S.)*, 2012 WI App 25, ¶ 32, 339 Wis. 2d 442, 813 N.W.2d 229. Although Wis. Stat. § 808.03(1) does not require rendering (i.e., signing pursuant to Wis. Stat. §§ 806.06(1) and 807.11) as a condition of appeal, a judgment or order must nonetheless be signed before it can be filed. *Bruns v. Muniz*, 97 Wis. 2d 742, 745, 295 N.W.2d 11 (Ct. App. 1980).

Appeal from a judgment of conviction does not allow review of an oral order denying a postconviction motion. *State v. Malone*, 136 Wis. 2d 250, 258, 401 N.W.2d 563 (1987). The order is not appealable until reduced to writing and entered and is not reviewable incident to appeal, because a notice of appeal only covers matters leading up to and including the entry of final judgment. *Id.*

There is one exception to the rule precluding appeals from oral orders. Wis. Stat. § 805.17(3) provides that an appeal may be taken from an order on the record denying a motion for reconsideration after a trial to the court.

Comment. This provision is completely at odds with one of the cardinal rules of appellate procedure and should be repealed or reconsidered. The better and, otherwise, uniform rule is to require a written document as a prerequisite to appeal.

C. Exceptions [§ 4.19]

An exception to the rule limiting appeals to "entered" orders and judgments exists in cases involving traffic-regulation or municipal-ordinance violations, as well as small claims and other cases under Wis. Stat. ch. 799. In recognition of the fact that

orders and judgments are rarely rendered or entered in these types of cases, Wis. Stat. § 808.03(1) allows the circuit court clerk's docket entry of the final disposition of the case to stand as an order or judgment for appeal purposes. The right to appeal from a docket entry in traffic forfeitures and ordinance violations applies not only to cases initially prosecuted in circuit court, but also to cases appealed to circuit court after being initiated in municipal court. *Village of McFarland v. Zetzman*, 2012 WI App 49, ¶ 11, 340 Wis. 2d 700, 811 N.W.2d 822. Subsequent entry of a "final" order in a traffic-regulation case does not extend the time for appeal. The controlling event is the docket entry. *See City of Sheboygan v. Flores*, 229 Wis. 2d 242, 248, 598 N.W.2d 307 (Ct. App. 1999).

The court formerly would dismiss an appeal if the notice of appeal was filed before entry. *See Ramsthal Advert. Agency v. Energy Miser, Inc.*, 90 Wis. 2d 74, 75–76, 279 N.W.2d 491 (Ct. App. 1979). But now, a notice of appeal or intent to appeal filed after the judgment or order is granted, but before entry of the judgment or order, will be treated as filed after that entry and on the same day of the entry. Wis. Stat. § 808.04(8). Note that this statute does not eliminate the requirement that a final judgment or order be reduced to writing and entered. It simply provides that a notice of appeal prematurely filed before entry will not be invalid so long as the record discloses that the judgment or order was entered after the notice of appeal was filed.

D. Filing Date [§ 4.20]

Although electronic filing (e-filing) has eliminated most issues about proving the date of filing, issues may arise in cases not commenced by e-filing—for example, in self-represented (pro se) appeals. In such cases, the date of filing a judgment or order with the clerk of circuit court is normally determined by the clerk's file stamp on the document. In recognition that documents timely received are sometimes not timely file-stamped, the courts have concluded that the date of filing is the date the document is actually received in the clerk's office. *See Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis. 2d 813, 822, 284 N.W.2d 93 (1979); *Helmrick v. Helmrick*, 95 Wis. 2d 554, 556, 291 N.W.2d 582 (Ct. App. 1980). When the file stamp does not reflect the true filing date, the appellate court has considered affidavits of the parties and of personnel in the clerk's office. If a conflict still exists about the actual filing date, the matter may be remanded to the circuit court for fact-finding while appellate jurisdiction is retained. *Wisconsin State Emps. Union v. Henderson*, 106 Wis. 2d 498, 501–02, 317 N.W.2d 170 (Ct. App. 1982) (citing, *e.g.*, *Krueger v. State*, 84 Wis. 2d 272, 275, 267 N.W.2d 602 (1978)).

Neither the parties nor the court can agree to withhold entry of a final order or judgment once it has been signed by the court. *Werner v. Hendree*, 2009 WI App 103, ¶ 7, 320 Wis. 2d 592, 770 N.W.2d 782 (holding that date of entry or filing controls, notwithstanding agreement of parties and circuit court that orders should have been held, and not filed, after signing by the court), *rev'd on other grounds*, 2011 WI 10, 331 Wis. 2d 511, 795 N.W.2d 423. Nevertheless, Wis. Stat. § 806.07 may provide the circuit court with authority to vacate and reenter a previously entered order or judgment under extraordinary circumstances, particularly when the court's own error would otherwise deprive a party of the right to an appeal. *Werner*, 2011 WI 10, ¶¶ 70–82, 331 Wis. 2d 511.

When a judge from one county is assigned to decide a case filed in another county, filing and entry of documents for appeal purposes occur when those documents are received by the clerk in the county in which the case is commenced. *State v. Williams*, 230 Wis. 2d 50, 54, 601 N.W.2d 838 (Ct. App. 1999). This is not true, however, in cases in which there has been a change of venue. *Id.* at 55; *see* Wis. Stat. § 801.61.

V. Matters Reviewable Incident to Appeal [§ 4.21]

When a final order or judgment is appealed, the appeal also places before the court all prior nonfinal judgments, orders, and rulings adverse to the appellant and favorable to the respondent. Wis. Stat. § 809.10(4). Only these prior nonfinal matters are reviewable incident to appeal. If any prior orders or judgments are final, they must be reviewed by a separate notice of appeal. For example, an order dismissing one party from multiparty litigation is final and must be appealed at the time of the dismissal. It is not reviewable in an appeal from an order or judgment terminating the remainder of the litigation. *See* Wis. Stat. § 809.10(4) Judicial Council note—1978. The rule allowing review of prior nonfinal rulings in an appeal from a final order or judgment also applies to administrative review proceedings. *Sierra Club v. DNR*, 2007 WI App 181, ¶ 27, 304 Wis. 2d 614, 736 N.W.2d 918.

In multiparty litigation, a nonfinal order or judgment is reviewable incident to appeal only if the party prevailing on that issue is properly a respondent on appeal. Parties to the litigation who are not adverse to an appeal as of right do not constitute respondents to the appeal. *See infra* § 6.7. An appellate court has no jurisdiction to review nonfinal orders related to persons not parties to the appeal. *See Commerce Bluff One Condo. Ass'n v Dixon*, 2011 WI App 46, ¶ 9, 332 Wis. 2d 357, 798 N.W.2d 264. Moreover, no

agreement of the parties may give the appellate court jurisdiction that does not otherwise exist. *Id.* ¶ 17 (holding that *Pierringer* releases signed by nonrespondents did not make them parties to appeal).

In addition to prior nonfinal orders and judgments, rulings are also reviewable incident to appeal. Thus, for example, oral pronouncements on evidence, orders denying motions, or judgments granting interlocutory relief are reviewable on an appeal from a final order or judgment. As a general rule, to be reviewed incident to an appeal, these prior nonfinal matters must be adverse to the appellant and favorable to the respondent. In most cases, however, when all persons who were parties in the circuit court are joined in the appeal, all intermediate orders may be reviewed. *See State v. Alles*, 106 Wis. 2d 368, 392 n.7, 316 N.W.2d 378 (1982).

An appeal from a final judgment does not include orders entered after the judgment. *See, e.g.*, *Chicago & N.W. R.R. v. LIRC*, 91 Wis. 2d 462, 473, 283 N.W.2d 603, 608–09 (Ct. App. 1979), *aff'd*, 98 Wis. 2d 592, 297 N.W.2d 819 (1980). Final postjudgment orders are appealable but must be specified if appealed with the prior judgment. An appeal from a final order terminating a special proceeding does not allow review of orders entered in the underlying litigation. *See State v. Heyer*, 174 Wis. 2d 164, 168, 496 N.W.2d 779 (Ct. App. 1993).

Supplement Chapter 5
Filing a Civil Appeal as of Right

Book sections supplemented: 5.1, 5.3, 5.4, and 5.5

5.1 Scope

Page 2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023; and all references to form numbers are to Wisconsin Court of Appeals forms, as updated through Feb. 13, 2022.

5.3 [Time for Appeal] In General

Pages 2–3: Added textual sentence after ACLU *citation and amended signal before* Werner *citation in section*

With the possible exception of Wis. Stat. § 808.03(1), which defines a final order or judgment appealable as of right, the most important rule for an appellate attorney to know is Wis. Stat. § 808.04, which prescribes the time limitations for initiating an appeal. An appellate court has no discretion to waive or extend the time for filing a notice of appeal or cross-appeal in a civil case, except in a termination-of-parental-rights case. Wis. Stat. § 809.82(2)(b). Moreover, a circuit court cannot effect an extension of the time for appeal by vacating and then reentering the judgment. *ACLU v. Thompson*, 155 Wis. 2d 442, 445, 455 N.W.2d 268 (Ct. App. 1990). But this general rule is not hard and fast in all cases. *See Werner v Hendree*, 2011 WI 10, ¶¶ 70–80, 331 Wis. 2d 511, 795 N.W.2d 423 (holding that circuit court's action of signing orders and causing them to be filed, when court had assured parties it would defer taking such action, constituted extraordinary circumstances warranting relief pursuant to Wis. Stat. § 806.07(1)(h)); *Edland v. Wisconsin Physicians Serv. Ins. Corp.*, 210 Wis. 2d 638, 563 N.W.2d 519 (1997) (holding that court's failure to give parties its final order warranted vacating that order given that parties did not learn of original order until after expiration of appeal period). If an attorney has not complied with Wis. Stat. § 808.04, an appellate court does not obtain subject-matter jurisdiction over the appeal, and the appeal must be dismissed. Wis. Stat. § 809.10(1)(e); *see also La Crosse Tr. Co. v. Bluske*, 99 Wis. 2d 427, 428, 299 N.W.2d 302 (Ct. App. 1980); *Bruns v. Muniz*, 97 Wis. 2d 742, 743, 295 N.W.2d 11 (Ct. App. 1980).

5.4 Time for Appeal] 45/90 Rule

Page 3: Amended section heading

45/90 Rule and Exceptions

Page 4: Added textual sentence and citation to end of second-to-last paragraph in section

An expedited appeal period of 15 days is provided under Wis. Stat. § 808.04(2) for cases in which the validity of state law is challenged in a federal court, Wis. Stat. § 227.60, and eviction cases, *see* Wis. Stat. § 799.445. A 20-day appeal period is provided in a public records appeal under Wis. Stat. § 19.356. Wis. Stat. § 808.04(1m); *Zellner v. Herrick*, 2009 WI 80, ¶ 4, 319 Wis. 2d 532, 770 N.W.2d 305. Appeals from orders related to political subdivision decisions under Wis. Stat. § 781.10(2)(d)5. (concerning applications for residential development) must be filed within 30 days. Wis. Stat. § 808.04(1s).

5.5 [Time for Appeal] Notice of Entry

Page 5: Replaced second paragraph in section

Wis. Stat. § 806.06(3) requires that a notice of entry be in writing, contain the date of entry, and be given (i.e., served) after entry. If a notice of entry fails to satisfy any of these requirements, it will be fatally defective, and the 90-day appeal period will apply. Consistent with the rule requiring strict compliance with notice procedures, a notice of entry mailed to an incorrect address is invalid, and the court cannot look beyond such an error to determine whether the party had actual notice of the entry of judgment. *See Nichols v. Conlin*, 198 Wis. 2d 287, 289–90, 542 N.W.2d 194 (Ct. App. 1995). It follows that actual notice of entry given to e-filing parties also will not suffice for a valid notice of entry. A party wishing to shorten the appeal time must serve a separate e-filed notice of entry, after the judgment has been entered.

Chapter 5
Filing a Civil Appeal as of Right

I. Scope
[§ 5.1]

This chapter covers the mechanics of taking an appeal as of right in a civil case. The procedure for criminal appeals is described in chapter 19, *infra*. The general rules governing who must file appellate documents electronically and who may file by traditional methods are covered in detail in chapter 18, *infra*. The procedure for appealing nonfinal orders and judgments is described in chapter 9, *infra*.[1]

An appeal is initiated by filing a notice of appeal with the clerk of circuit court. Timely filing of an appeal is essential to subject-matter jurisdiction. This chapter outlines the time for filing, the form of the notice, and the method of filing, including filing fees. The notice of entry of judgment, which may shorten the time for appeal, is also discussed in this chapter, as is voluntary dismissal of an appeal.

Note. This chapter should be read in conjunction with chapter 4, *supra*, to determine whether the appeal is from a final order or judgment and therefore appealable as of right.

II. Time for Appeal [§ 5.2]

A. In General
[§ 5.3]

With the possible exception of Wis. Stat. § 808.03(1), which defines a final order or judgment appealable as of right, the most important rule for an appellate attorney to know is Wis. Stat. § 808.04, which prescribes the time limitations for initiating an appeal. An appellate court has no discretion to waive or extend the time for filing a notice of appeal or cross-appeal in a civil case, except in a termination-of-parental-rights case. Wis. Stat. § 809.82(2)(b). Moreover, a circuit court cannot effect an extension of the time for appeal by vacating and then reentering the judgment. *ACLU v. Thompson*, 155 Wis. 2d 442, 445, 455 N.W.2d 268 (Ct. App. 1990). *But see Werner v Hendree*, 2011 WI 10, ¶¶ 70–80, 331 Wis. 2d 511, 795 N.W.2d 423 (holding that circuit court's action of signing orders and causing them to be filed, when court had assured parties it would defer taking such action, constituted extraordinary circumstances warranting relief pursuant to Wis. Stat. § 806.07(1)(h)); *Edland v. Wisconsin Physicians Serv. Ins. Corp*., 210 Wis. 2d 638, 563 N.W.2d 519 (1997) (holding that court's failure to give parties its final order warranted vacating that order given that parties did not learn of original order until after expiration of appeal period). If an attorney has not complied with Wis. Stat. § 808.04, an appellate court does not obtain subject-matter jurisdiction over the appeal, and the appeal must be dismissed. Wis. Stat. § 809.10(1)(e); *see also La Crosse Tr. Co. v. Bluske*, 99 Wis. 2d 427, 428, 299 N.W.2d 302 (Ct. App. 1980); *Bruns v. Muniz*, 97 Wis. 2d 742, 743, 295 N.W.2d 11 (Ct. App. 1980).

B. 45/90 Rule

[§ 5.4]

Wis. Stat. § 808.04(1) sets forth what is called *the 45/90 rule*. The statute provides that appeals to the court of appeals must be initiated within 45 days after entry of the final order or judgment appealed from *if written notice of entry is given* or within 90 days after entry if notice of entry is not given.

The 45/90 rule applies to the great majority of appeals. A few exceptions to the 45/90 rule are specified in Wis. Stat. § 808.04, however. The major exceptions, set forth in Wis. Stat. § 808.04(3), are for criminal appeals and appeals taken under Wis. Stat. § 971.17 (Commitments of Persons Found Not Guilty by Reason of Mental Disease or Defect), Wis. Stat. ch. 48 (Children's Code), Wis. Stat. ch. 51 (Mental Health Act), Wis. Stat. ch. 55 (Protective Service System), Wis. Stat. ch. 938 (Juvenile Justice Code), and Wis. Stat. ch. 980 (Sexually Violent Person Commitments). These appeals are governed by Wis. Stat. §§ 809.30(2) and 809.32(2), which are discussed in chapter 19, *infra*. The state's appeals in criminal cases and cases involving Wis. Stat. § 971.17, Wis. Stat. ch. 48, Wis. Stat. ch. 938, or Wis. Stat. ch. 980 must be taken within 45 days after the entry of the judgment or order appealed from. Wis. Stat. § 808.04(4).

In certain cases involving claims against a governmental body or agency, a notice of claim must be filed. *See, e.g.*, Wis. Stat. § 893.80(1d). When a litigant is faced with the requirement of meeting the notice-of-claim statute and the requirement of filing an appeal in timely fashion, the court of appeals has held that the notice-of-appeal time limit takes precedence. *See Gamroth v. Village of Jackson*, 215 Wis. 2d 251, 259, 571 N.W.2d 917 (Ct. App. 1997).

Appeals in adoption cases must be commenced by filing a notice of intent in the circuit court as in Wis. Stat. § 809.30(2)(b), except that the time for filing the notice of intent is 40, not 20, days and cannot be extended. Wis. Stat. § 808.04(7). Appeals in termination-of-parental-rights cases are similarly commenced, except that the time for filing the notice of intent is only 30 days, and the time may be extended. *See* Wis. Stat. §§ 808.04(7m), 809.107, 809.82(2)(b).

Note. In appeals in termination-of-parental-rights cases, for an appellant other than the state, the appellant and appellant's counsel, if any, must sign the notice of intent. Counsel cannot sign in lieu of the appellant. Wis. Stat. § 809.107(2)(bm)6.

Comment. This appears to be the only instance in which a non-self-represented litigant must sign a notice of intent.

Failure to contemporaneously serve a notice of intent to appeal on the adverse party at the time of filing the notice of intent does not make untimely a notice of intent properly filed within the statutory period. *Carla B. v. Timothy N. (In re Termination of Parental Rts. to Jessica N.)*, 228 Wis. 2d 695, 700, 598 N.W.2d 924 (Ct. App. 1999).

Appeals from orders relating to an electronics and information technology manufacturing zone must be taken by filing a notice of appeal within 30 days after entry of the challenged order or judgment. Wis. Stat. § 808.04(7p). These appeals also have an expedited schedule for filing the record, transcripts, and briefs. *See infra* §§ 7.2, 11.29. Appeals from certification or decertification orders entered in class actions must be taken by filing a notice of appeal within 14 days after entry. Wis. Stat. § 803.08(11).

An expedited appeal period of 15 days is provided under Wis. Stat. § 808.04(2) for cases in which the validity of state law is challenged in a federal court, Wis. Stat. § 227.60, and eviction cases, *see* Wis. Stat. § 799.445. A 20-day appeal period is provided in a public records appeal under Wis. Stat. § 19.356. Wis. Stat. § 808.04(1m); *Zellner v. Herrick*, 2009 WI 80, ¶ 4, 319 Wis. 2d 532, 770 N.W.2d 305.

Finally, Wis. Stat. § 808.04(6) provides that when a party to an action or special proceeding dies during the period allowed for appeal, the time to appeal is the time provided by law or 120 days after death, whichever period is later.

C. Notice of Entry
[§ 5.5]

As noted in section 5.4, *supra*, the time for appeal is 90 days from entry of the final judgment or order appealed from unless *written notice of entry* is given. Written notice of entry halves the appeal period to 45 days *from the date of entry*. Consistent with a policy favoring the right to appeal, the courts have established rigid standards that must be met if a notice of entry is to be effective to shorten the appeal time.

Wis. Stat. § 806.06(3) requires that a notice of entry be in writing, contain the date of entry, and be given (i.e., served) after entry. If a notice of entry fails to satisfy any of these requirements, it will be fatally defective, and the 90-day appeal period will apply. Consistent with the rule requiring strict compliance with notice procedures, a notice of entry mailed to an incorrect address is invalid, and the court cannot look beyond such an error to determine whether the party had actual notice of the entry of judgment. *See Nichols v. Conlin*, 198 Wis. 2d 287, 289–90, 542 N.W.2d 194 (Ct. App. 1995). An error in the title of the notice, stating it is a "Notice of Entry of Judgment" when, in fact, the matter to be appealed is a final "Order," is a fatal defect, invalidating the notice. *See Clausing v. LIRC*, No. 2014AP1581 (Wis. Ct. App. Sept. 8, 2014) (unpublished opinion not citable per Wis. Stat. § 809.23(3)).

The written notice of entry required by Wis. Stat. § 806.06(3) must be more than simply any writing that gives a party notice that an order or judgment has been entered. A copy of the order or judgment will not serve as a notice of entry. *Hooker v. Hooker*, 8 Wis. 2d 331, 341, 99 N.W.2d 113 (1959). Nor is a letter or other informal writing sufficient. *See* Wis. Stat. § 806.06 Judicial Council Notes—1981. The notice of entry must be formal, captioned, and signed. *Soquet v. Soquet*, 117 Wis. 2d 553, 561, 345 N.W.2d 401 (1984).

A notice of entry given before the entry of the judgment is ineffective to shorten the time to appeal from 90 days to 45 days. *Sub-Zero Freezer Co. v. Manhattan Life Ins. Co.*, 90 Wis. 2d 76, 78, 279 N.W.2d 492 (Ct. App. 1979). A notice of entry containing the wrong date is also insufficient to shorten the appeal time. *Mock v. Czemierys*, 113 Wis. 2d 207, 210, 336 N.W.2d 188 (Ct. App. 1983).

To shorten the appeal period to 45 days, the notice of entry must be served on the other parties within 21 days after the entry of the final judgment or order. Wis. Stat. §§ 808.04(1), 806.06(5). As with determining the time for filing a notice of appeal, it is the entry (filing) of the order or judgment, not the rendering (signing), that triggers the time period. *Linnmar, Inc. v. First Enters., Inc.*, 161 Wis. 2d 706, 708, 468 N.W.2d 753 (Ct. App. 1991). Because service is complete upon mailing, Wis. Stat. § 801.14(2), a notice of entry mailed on the 21st day after entry is timely even if received several days later. *Bruns v. Muniz*, 97 Wis. 2d 742, 746, 295 N.W.2d 11 (Ct. App. 1980). Because the 45-day appeal period applicable when written notice of entry is given runs from the date of entry of the judgment or order, not from the date of service of the notice of entry, *Fredrick v. City of Janesville*, 91 Wis. 2d 572, 578, 283 N.W.2d 480 (Ct. App.), *rev'd on other grounds*, 92 Wis. 2d 685, 285 N.W.2d 655 (1979), a notice of entry timely served by mail on the 21st day after entry could leave the prospective appellant with fewer than 24 days in which to file a notice of appeal.

Note. Service by email is now allowed. Wis. Stat. § 801.14(2); *see infra* § 18.7.

When a party denies receiving a notice of entry, the matter must be remanded to the circuit court for fact-finding. *Mullen v. Braatz*, 179 Wis. 2d 749, 756, 508 N.W.2d 446 (Ct. App. 1993).

The general rule adding three days to a time period when service is by mail, Wis. Stat. § 801.15(5), does *not* apply when notice of entry is served by mail. Because civil appeal periods cannot be extended, a party served notice of entry by mail cannot invoke

Wis. Stat. § 801.15(5) to extend the 45-day appeal period. *Bruns*, 97 Wis. 2d at 746.

After service of the notice of entry on the parties within 21 days after the entry date, the notice must be filed in the circuit court "within a reasonable period of time." *Soquet*, 117 Wis. 2d at 561. This time requirement apparently refers to the requirement of Wis. Stat. § 801.14(4), which states that all papers served on a party must be filed with the court within "a reasonable time."

Because most filers (except self-represented litigants and a few others) will be electronic filers and electronic servers in the circuit court, filing and service of a notice of entry will be simultaneous when the notice is electronically filed (e-filed) in the circuit court. Wis. Stat. § 801.18(4)(c); *cf.* Wis. Stat. § 809.801(4)(c). E-filing will eliminate disputes over giving notice by mail.

D. Computing Time for Appeal [§ 5.6]

Computing time periods for appeal is of the utmost importance because a notice of appeal must be timely filed for the court of appeals to have subject-matter jurisdiction. Wis. Stat. § 809.10(1)(e). As discussed in section 5.5, *supra*, both the 45- and the 90-day periods for an appeal are triggered by the entry of the appealable final order or judgment in the office of the clerk of circuit court. An order or judgment is entered when it is filed in the clerk's office; filing occurs when the clerk's office actually receives the order or judgment. Thus, the time for appeal begins to run on the date that the written order or judgment is actually received by the clerk of the circuit court. An appeal should not be filed before entry. *See supra* §§ 4.16–.20.

The day on which the judgment or order is entered is not counted in computing the time for appeal. Wis. Stat. § 801.15(1)(b). The last day of the 45- or 90-day period is counted, however, unless it falls on a day the clerk's office is closed. In that case, the notice is due the next day the office is open. *Id*. Therefore, if the last day of the appeal period falls on a holiday, but the clerk's office is open, a notice of appeal filed the next day is untimely. *See Klingbeil v. Perschke*, 228 Wis. 2d 421, 424, 596 N.W.2d 488 (Ct. App. 1999).

Wisconsin requires e-filing of all documents in the circuit court except for filings by self-represented persons and certain low-volume filing agents. *See* Wis. Stat. § 801.18; *see also infra* §§ 5.14, 5.15. The use of e-filing has eliminated issues that may arise concerning mailed or personally filed documents except in those few cases in which e-filing is not required. Because of those exceptions, however, a discussion of paper-filing issues is retained in this chapter.

Problems frequently arise regarding notices of appeal that are mailed to the court for filing. A notice of appeal must be timely filed, not just served. As already noted, the date of filing is the date on which the notice of appeal is physically delivered to and actually received by the clerk of circuit court. *Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis. 2d 813, 822, 824, 284 N.W.2d 93 (1979); *First Wis. Nat'l Bank v. Nicholaou*, 87 Wis. 2d 360, 365, 274 N.W.2d 704 (1979). Consequently, a notice of appeal is not filed upon mailing. Attorneys who take the risk of mailing a notice of appeal should do so with the knowledge that if, for any reason, the notice of appeal does not arrive in the clerk of court's office by the due date, the appeal will be untimely.

Notices of appeal filed by self-represented prisoners have been accepted as timely filed if they are delivered for mailing to prison authorities before the expiration of the filing date. *See State ex rel. Kelley v. State*, 2003 WI App 81, 261 Wis. 2d 803, 661 N.W.2d 854.

In summary, attorneys must always be alert to the 45/90 rule for initiating appeals. Subject to only a few exceptions, an appellant must file a notice of appeal within 45 days after entry of a final judgment or order if a proper, written notice of entry has been timely given or within 90 days after entry if no such notice has been given. The right to appeal in a civil case is irretrievably lost if the notice of appeal is not timely filed. All too often, notices of appeal are filed on the last possible day. Given the risks involved, however, appellants should make certain that notices of appeal are filed several days early to avoid mishap. Moreover, to be safe, notices of appeal should not be mailed. If a notice must be mailed, it should be mailed early.

E. Reconsideration and Time for Appeal [§ 5.7]

A motion for reconsideration of a final order or judgment, timely filed within 20 days after entry, effectively stays the time for appeal. Wis. Stat. § 805.17(3). If the circuit court grants the motion and amends the judgment, the time for appeal commences upon the entry of the amended judgment. *Id*. If the court denies the motion, the time for appeal commences when the court denies the motion on the record or when an order denying the motion is entered, whichever is first. *Id*. If the motion is not acted on within 90

days after entry of the original judgment, it is deemed denied, and the time for appeal commences 90 days after entry of judgment. *Id*.

A circuit court's letter of decision denying a motion for reconsideration is a denial on the record, just as an oral decision reported by a court reporter is a decision on the record. *Orth v. AmeriTrade, Inc*., 187 Wis. 2d 162, 167–69, 522 N.W.2d 30 (Ct. App. 1994). An order entered on the record is effective to commence the time for appeal, even if the order contemplated the later entry of a formal, written order. *Id*.

A proper notice of entry of judgment, given within 21 days after the entry of the original judgment, limits to 45 days the time for appeal after the denial of a motion for reconsideration under Wis. Stat. § 805.17(3). *Salzman v. DNR*, 168 Wis. 2d 523, 531, 484 N.W.2d 337 (Ct. App. 1992).

The 20-day period for filing a motion for reconsideration under Wis. Stat. § 805.17(3) cannot be extended, and a motion filed after the expiration of the 20 days is ineffective to modify the appeal period. *Wainwright v. Wainwright*, 176 Wis. 2d 246, 500 N.W.2d 343 (Ct. App. 1993).

Not all motions for reconsideration qualify as motions under Wis. Stat. § 805.17(3) that stay the appeal period. Wis. Stat. § 805.17(3) modifies the time for filing an appeal only when the motion for reconsideration is filed after a trial to the court. See *Continental Casualty Co. v. Milwaukee Metropolitan Sewerage District*, 175 Wis. 2d 527, 499 N.W.2d 282 (Ct. App. 1993), in which the court held that a motion for reconsideration filed after a summary judgment had no effect on the normal appeal time, and *Schessler v. Schessler*, 179 Wis. 2d 781, 784–85, 508 N.W.2d 65 (Ct. App. 1993), in which the court held that a motion for reconsideration filed after a final order in a postjudgment divorce proceeding stays the time for appeal *if* the postdivorce proceeding was an evidentiary proceeding. *See also Prince Corp. v. Vandenberg*, 2015 WI App 55, ¶ 44, 364 Wis. 2d 457, 868 N.W.2d 599 (deeming conceded argument that postjudgment garnishment order was not issued in trial to court, making inapplicable reconsideration provisions of Wis. Stat. § 805.17), *aff'd in part, rev'd in part on other grounds*, 2016 WI 49, 369 Wis. 2d 387, 882 N.W.2d 371. The stay provisions of Wis. Stat. § 805.17(3) do not apply to small-claims cases, such as eviction actions, which have much shorter appeal periods than those set forth in Wis. Stat. ch. 808. *See Highland Manor Assocs. v. Bast*, 2003 WI 152, 268 Wis. 2d 1, 672 N.W.2d 709. Thus, Wis. Stat. § 805.17(3) must be treated warily by those who would seek to avail themselves of an extended appeal period by filing a motion for reconsideration.

III. Contents of Notice of Appeal [§ 5.8]

A. In General [§ 5.9]

The requirements for the contents of the notice of appeal are minimal: the notice must specify the order or judgment appealed from, including the circuit court case name and number and the date of entry; whether the appeal is to be decided by one judge pursuant to Wis. Stat. § 752.31(2), rather than by a three-judge panel, *see infra* ch. 20; and whether the appeal must be given preference by statute. Wis. Stat. § 809.10(1)(b); *see also infra* § 15.5. If the appeal is under Wis. Stat. § 809.30 or 809.32, or appointed counsel is involved, additional information must be provided. *See* Wis. Stat. § 809.10(1)(b)5., 6.; *see also infra* § 19.15.

Practice Tip. In cases in which the state or an agent of the state was the sole defendant below, the ability of an appellant to select the district of the court of appeals to decide the appeal, *see* Wis. Stat. § 752.21(2); *supra* § 1.6, would suggest that the choice of district should be made at the outset of the appeal in the notice of appeal.

There is no requirement that the particular issues raised on appeal be identified in the notice of appeal or cross-appeal. *See Lord v. Hubbell, Inc*., 210 Wis. 2d 150, 159, 563 N.W.2d 913 (Ct. App. 1997). In fact, a party cannot limit the scope of an appeal by selectively appealing only part of the judgment. *See State v. Briggs*, 218 Wis. 2d 61, 69–71, 579 N.W.2d 783 (Ct. App. 1998). An appeal brings before the appellate court all of the judgment or order appealed from, even if the appellant attempts to limit review by the manner in which the notice of appeal is framed. *Id*.

B. Judgment or Order Appealed From [§ 5.10]

In specifying the order or judgment appealed from, all that is necessary is to give enough information to allow the appellate court to determine what is being appealed. A notice of appeal should read something like "John Doe appeals from the judgment entered September 30, 2021, in the Milwaukee County Circuit Court, John Q. Public, Judge," with a caption identifying the parties and the circuit court case number.

An appellate court may correct defects or omissions in a notice of appeal if the appeal was taken in good faith. Wis. Stat. § 807.07(1). Wisconsin courts have taken a liberal attitude about the necessary contents of notices of appeal and have held that defects or omissions in a notice are not jurisdictional. *See, e.g.*, *Northridge Bank v. Community Eye Care Ctr.*, 94 Wis. 2d 201, 203, 287 N.W.2d 810 (1980). Thus, if a notice of appeal incorrectly labels a judgment as an order or vice versa, the appellate court may correct the error, often sua sponte. An error as to the date of the order appealed from may also be corrected. *See State v. Avery*, 80 Wis. 2d 305, 259 N.W.2d 63 (1977). As long as the appellate court can tell what is being appealed, the notice of appeal is sufficient. *Id.*; *see also Rhyner v. Sauk Cnty.*, 118 Wis. 2d 324, 326, 348 N.W.2d 588 (Ct. App. 1984). This case law is codified in Wis. Stat. § 809.10(1)(f), which provides that inconsequential errors in a notice of appeal are not jurisdictional. The appellate courts do not, however, allow correction of a "fundamentally defective" notice of appeal. *See Brown v. MR Grp., LLC*, 2004 WI App 122, ¶ 11, 274 Wis. 2d 804, 683 N.W.2d 481; *see also infra* § 5.11.

A notice of appeal directed at a nonappealable order will be accepted by the court as sufficient to invoke appellate jurisdiction *if* it is apparent that the appellant actually intended to appeal from an existing appealable order and the notice of appeal was timely filed with respect to that final order. *Culbert v. Young*, 140 Wis. 2d 821, 824, 412 N.W.2d 551 (Ct. App. 1987). For example, the identification in a notice of appeal of the order granting judgment, rather than the judgment itself, as the judgment appealed from is an "inconsequential violation" of the rules of appellate procedure when both the order and the judgment were entered on the same day. *See Carrington v. St. Paul Fire & Marine Ins. Co.*, 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267 (1992).

C. Signature [§ 5.11]

A notice of appeal must also be signed. *See Jadair, Inc. v. U.S. Fire Ins. Co.*, 209 Wis. 2d 187, 200, 562 N.W.2d 401 (1997) (citing Wis. Stat. §§ 809.84, 801.14, 802.01(2)(d)); *see also infra* § 18.12 (when rules of civil procedure apply). A failure to sign is, however, a remediable omission. *See State v. Seay*, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437.

The supreme court has taken a harsh position requiring dismissal of an appeal when a notice of appeal filed on behalf of a corporation is signed by a nonlawyer. *See Jadair*, 209 Wis. 2d 187. The court reasoned in *Jadair* that this is not a defect or omission that can be corrected, *see* Wis. Stat. § 807.07(1); rather, it is a fundamental defect going to the jurisdiction of the court, because the signing of a notice of appeal by a nonlawyer on behalf of a corporation is the unauthorized practice of law contrary to statute, which renders the appeal void. *See Jadair*, 209 Wis. 2d at 212. Extending the rule of *Jadair*, the court of appeals has held that trustees of an organization cannot commence an appeal on its behalf. *Life Sci. Church v. Shawano Cnty.*, 221 Wis. 2d 331, 334, 585 N.W.2d 625 (Ct. App. 1998). Similarly, the filing of a notice of appeal on behalf of a decedent's estate by a nonlawyer personal representative of the estate is a fatal defect requiring dismissal of the appeal. *Ditech Fin., LLC v. Estate of Stacey*, 2018 WI App 18, 380 Wis. 2d 447, 909 N.W.2d 180 (dismissing appeal from order in mortgage foreclosure proceeding).

If a notice of appeal is e-filed (*see infra* § 18.3), it may be electronically signed (e-signed), and an attorney may delegate authority to another person to e-sign the document. *See* Wis. Stat. § 809.801(12)(d). The permissibility of this delegation, since July 1, 2021, is a departure from case law, which had held that a signature on a document filed by traditional means was fundamentally defective if signed by a nonattorney on the attorney's behalf, even if reviewed and approved by the attorney. *Brown v. MR Grp., LLC*, 2004 WI App 122, ¶¶ 6, 13, 274 Wis. 2d 804, 683 N.W.2d 481. If the notice of appeal is filed and signed by a self-represented person but prepared with assistance of an attorney, the notice (as well as any other document prepared with assistance of counsel) must include a statement that "[t]his document was prepared with the assistance of counsel," to be located immediately adjacent to the self-represented person's signature. Wis. Stat. § 802.05(2m).

In termination-of-parental-rights appeals, the notice of appeal must be signed by the appellant (except if the appellant is the state), in addition to the appellant's attorney, if any. The appellant's attorney cannot sign in lieu of the appellant. Wis. Stat. § 809.107(5)(a).

Comment. This is, apparently, the only instance in which a non-self-represented litigant must sign a notice of appeal.

D. Identification of Cases for One-Judge Appeals and Cases with Statutory Preference [§ 5.12]

It is not known how the court would treat a failure to comply with the statutory requirement of properly identifying a case as a one- or three-judge case or as an appeal deserving statutory preference. *See infra* § 15.5 (statutes requiring preferential disposition). Consistent with the liberal policy on the contents of notices of appeal, errors or omissions regarding these requirements should be viewed as inconsequential, not jurisdictional, and the appeal should not be dismissed. On the other hand, a failure to correctly provide such information does violate Wis. Stat. § 809.10(1)(b), and even if the appeal is not dismissed, some other penalty may be imposed under Wis. Stat. § 809.83(2), which allows the imposition of sanctions when a court order or the rules of appellate procedure are violated. A failure to properly identify an appeal as a one- or three-judge case or as a case deserving preferential treatment would have no effect, however, on whether the case is, in fact, heard by one or three judges or given preference.

IV. Filing and Serving Notice of Appeal [§ 5.13]

A. E-Filing: Most Cases [§ 5.14]

The notice of appeal is filed with the circuit court. Wis. Stat. § 809.10(1)(a). All documents filed in Wisconsin circuit courts, including the notice of appeal, are e-filed except in cases of self-represented persons and certain agents of low-volume filers. *See* Wis. Stat. § 801.18. Because of these exceptions to mandatory e-filing, this chapter's discussion of paper filing of a notice of appeal in person or by mail and of filing a notice of appeal by fax continues to be relevant. *See infra* § 5.15.

Because attorneys should already be familiar with e-filing in circuit court actions, this chapter will not outline those procedures, except to note that the major difference between e-filing and paper filing is that an e-filing is deemed filed on a particular date if e-filing is completed by 11:59 p.m. central time on that date and if the clerk of court determines that the notice satisfies the content requirements discussed in sections 5.9–.11, *supra*. *See* Wis. Stat. § 801.18(4)(am); *see also* Wis. Stat. § 801.16(2)(f) (providing similar rule for fax filings).

B. Paper and Fax Filing: Limited Cases [§ 5.15]

Instead of e-filing, self-represented persons and some non-high-volume filing agents can file a paper notice of appeal in the office of the circuit court clerk. Wis. Stat. §§ 809.10(1)(a), 801.18(3)(c).

Note. Persons who are allowed to paper-file may choose to file electronically. *See* Wis. Stat. § 801.18(3)(b), (c).

Although paper parties such as self-represented litigants must paper-file documents with the court, they need not serve them on e-filing parties because the e-filing system will have the documents entered and provide notice of activity, which constitutes service. Wis. Stat. § 809.80(2)(c). All paper parties must, however, be served papers by traditional means whether the server be an e-filer or a paper filer. Wis. Stat. § 809.80(2)(e).

Because the paper-filing date of a notice of appeal is the date the notice is actually received by the clerk, not the date of mailing, it is wise to file in person rather than by mail to ensure timely receipt. *See supra* § 5.6. If the file stamp on the notice does not reflect the actual date of receipt, an appellate court will consider affidavits of the parties and of the personnel in the clerk's office to determine whether the filing was timely. If the affidavits reveal a factual dispute, the matter will be remanded to the circuit court for fact-finding. *Rome v. Betz*, 120 Wis. 2d 528, 529, 355 N.W.2d 844 (Ct. App. 1984).

Papers must be filed with the clerk of court's office during regular business hours. *Northern Air Servs., Inc. v. Link*, 2011 WI 75, ¶ 11 n.4, 336 Wis. 2d 1, 804 N.W.2d 458 (referring to the concurring opinion of Justice Ziegler joined by three other justices). *Northern Air Services* established a bright-line rule overruling *Granado v. Sentry Insurance*, 228 Wis. 2d 794, 599 N.W.2d 62 (Ct. App. 1999), which had allowed the circuit court clerk to exercise discretion in accepting papers for filing.

A notice of appeal may be filed by fax. *See State v. Sorenson*, 2000 WI 43, ¶ 28, 234 Wis. 2d 648, 611 N.W.2d 240 (overruling *Pratsch v. Pratsch*, 201 Wis. 2d 491, 548 N.W.2d 852 (Ct. App. 1996)). Not all papers, however, can be filed by fax. *Id*. ¶ 35. Rules concerning fax filings are set forth in Wis. Stat. § 801.16(2). A fax filing is considered filed on a particular day if submitted by 11:59

p.m. Central Time, as long as the clerk later accepts it on review. Wis. Stat. § 801.16(2)(f). Documents submitted by fax after 11:59 p.m. are considered filed the next day the clerk's office is open. *Id.*

Another practice encountered in several counties, including Milwaukee County, is that appeals from orders or judgments of the probate court are filed with the register in probate rather than with the clerk of circuit court. Although this practice has no statutory support, it is a well-accepted custom and has not been challenged in the courts. It would appear, however, that a notice of appeal timely received by the clerk of circuit court, but rejected for filing on the grounds that it should go to the register in probate, should be considered timely filed even if filing with the register does not occur until the appeal period expires. *Cf. Rome v. Betz*, 120 Wis. 2d 528, 355 N.W.2d 844 (Ct. App. 1984).

The Milwaukee County Clerk of Circuit Court has special divisions for civil and criminal cases. Notices of appeal and other documents should be filed with those offices, although materials sent to the main clerk of court's office generally will be appropriately transmitted. *See infra* app. B.

To avoid any difficulties with filing, paper filers should consult the clerk of court to ascertain local practice. A table showing the names and addresses of the clerks of circuit court as of the writing of the revision of this book is included in appendix B, *infra*.

C. Service [§ 5.16]

The notice of appeal must be served on all parties. Wis. Stat. § 809.80. Service is performed on e-filers automatically by the e-filing system when the notice of appeal is filed. Wis. Stat. §§ 801.18(4)(c), 809.10(1)(h); *see also* Wis. Stat. § 809.801(4)(c). All paper filers must, however, be traditionally served. Wis. Stat. §§ 809.10(1)(h), 809.80(2)(e). The filing of the notice of appeal constitutes certification that service has been made. Wis. Stat. § 801.14(4). Thus, service should precede or be simultaneous with filing. Wis. Stat. § 801.14(4) eliminates the prior requirement of an affidavit of service. *State v. Rhone*, 94 Wis. 2d 682, 687–88, 288 N.W.2d 862 (1980).

Note. In any appeal of any action affecting the family in which support or maintenance of a child is at issue, a copy of the notice of appeal must be served on the Department of Children and Families. Wis. Stat. § 767.217(2).

Comment. This requirement appears to be widely, if not uniformly, disregarded by attorneys, and would appear to have no jurisdictional significance.

Although a failure to serve is not a jurisdictional defect, *Rhone*, 94 Wis. 2d at 688, it is a violation of the rules of appellate procedure and may therefore be the basis for a motion to dismiss or some other sanction pursuant to Wis. Stat. § 809.83(2). *Rhone*, 94 Wis. 2d at 688; *see also* Robert J. Martineau & Richard R. Malmgren, *Wisconsin Appellate Practice* 37–39 (1978). It is unlikely that an appeal would be dismissed because of failure to serve a notice of appeal; such a sanction would seem unduly harsh. A more likely response by the court would be to order service and impose a monetary penalty on the appellant or appellant's counsel.

D. Documents and Fees Forwarded to Court of Appeals Along with the Notice of Appeal [§ 5.17]

1. In General [§ 5.18]

At the time of filing, in the circuit court, certain appellate documents—the notice of appeal, Wis. Stat. § 809.10(1)(a), the docketing statement, Wis. Stat. § 809.10(1)(d); *see infra* § 15.9, motions for a three-judge panel or for a hearing in the county of origin, Wis. Stat. § 809.10(1)(g); *see infra* §§ 20.4–.7, and the statement on transcript, Wis. Stat. § 809.11(4)(b); *see infra* § 7.2—those documents will be entered into the e-filing system and forwarded to the court of appeals. *See* Wis. Stat. §§ 809.801(4)(b), 809.80(2)(c). Service of these documents is complete once they are entered into the e-filing system, Wis. Stat. §§ 809.10(1)(h), 809.801(4)(c), 809.80(2)(c), except that paper parties must be served by traditional means, Wis. Stat. §§ 809.10(1)(h), 809.80(2)(e).

After the above-referenced documents are filed, all additional appellate filings (except motions for relief pending appeal, which ordinarily are filed in the circuit court, *see infra* ch. 14) are in the court of appeals. *See* Wis. Stat. § 809.10(1)(i).

2. Docketing Statement [§ 5.19]

Wis. Stat. § 809.10(1)(d) requires an appellant to file a docketing statement in the circuit court when the notice of appeal is filed. This is a change from appellate practice before July 1, 2021. Formerly, the docketing statement was filed in the court of appeals. Wis. Stat. § 809.10(1)(d) (2019–20). The purpose and contents of the docketing statement are described in section 15.9, *infra*.

3. Filing Fee [§ 5.20]

A filing fee payable to the clerk of the court of appeals must be paid along with the notice of appeal filed in the circuit court. Wis. Stat. §§ 809.11(1), 809.25(2)(a)1. The current fee is $195. Wis. Stat. § 809.25(2)(a)1. When e-filing is required, *see supra* § 5.14, the filing fee must also be e-filed. *See* Wis. Stat. § 801.18(7). Most circuit court clerks also require a local filing fee to be submitted at the same time. A problem arises in some counties because of the differing practices among circuit court clerks concerning filing fees. In one case, for example, a clerk of circuit court refused to accept a notice of appeal for filing because it was not accompanied by the local fee in addition to the court of appeals fee. The local fee was paid after the time for appeal had expired. The court of appeals held that the appeal was timely because the appeal was filed when the notice of appeal and the court of appeals fee were received, not when the notice of appeal was file-stamped upon payment of the local fee. *Rome v. Betz*, 120 Wis. 2d 528, 355 N.W.2d 844 (Ct. App. 1984). In addition, the clerk of circuit court cannot refuse to accept a notice of appeal for failure to pay the appellate court filing fee. Wis. Stat. § 809.10(1)(a). But the clerk of the court of appeals may refuse to accept a notice without the fee and may dismiss an appeal for failure to pay the fee or to obtain a waiver. Wis. Stat. §§ 809.25(2)(c), 809.83(2).

An appellant seeking waiver of the filing fee should file a motion or petition with the clerk of the court of appeals using a form that can be obtained from the court. Wis. Stat. § 809.11(1); Form AP-010. The appeal is considered filed but is contingent on the court of appeals' later granting of the motion to proceed in forma pauperis or, if that motion is denied, on the later payment of the filing fee. The appeal will be dismissed for failure to pay the fee if a waiver is not granted. The internal operating procedures for the court of appeals, reproduced in section 21.27, *infra*, describe this procedure. *See also* Wis. Stat. § 814.29.

4. Docketing of Appeal [§ 5.21]

The notice of appeal, the docketing statement, motions for a three-judge panel or for a hearing in the county of origin, and the circuit court record are transmitted by the clerk of the circuit court to the court of appeals within three days after filing in the circuit court. Wis. Stat. § 809.11(2). Upon receiving these items, the clerk of the court of appeals dockets the appeal. Wis. Stat. § 809.11(3). Docketing means that the appeal is assigned an identification number and is officially designated as an appeal. *See* Wis. Stat. § 809.01(10). The court then informs the parties that a notice of appeal has been filed and requests the parties to alert the court to any changes in the caption.

V. Voluntary Dismissal [§ 5.22]

At any time before the court's decision on an appeal, an appellant may dismiss the appeal without the approval of the court or the respondent. Wis. Stat. § 809.18(1). To prevent a needless expenditure of judicial resources, the parties must immediately notify the court of appeals if the entire matter has been compromised or otherwise settled, after which the court must dismiss the appeal. Wis. Stat. § 809.18(2). Dismissal of an appeal does not affect the status of a lower court decision, the status of a cross-appeal, or the right of a respondent to file a cross-appeal. As the 1978 Judicial Council Committee notes to Wis. Stat. § 809.18 state, "the [r]ule specifically protects a respondent who has or intends to file a cross-appeal, and for this reason the appellant is authorized to dismiss the appeal at will."

An appellant accomplishes the dismissal by filing a notice of dismissal with the clerk of the court of appeals or, if the case has not yet been docketed, with the clerk of the circuit court. The filing of a notice of dismissal does not affect the appellant's liability for costs or fees, nor does filing a notice of dismissal affect the power of the court to impose a penalty under Wis. Stat. § 809.83, if it determines that the appeal was taken for purposes of delay.

A cross-appellant has all the rights and obligations of an appellant and is therefore equally permitted to file a notice of voluntary dismissal. Wis. Stat. § 809.10(2)(b).

The court of appeals must allow an appellant's voluntary dismissal, even if the dismissal is framed as a motion rather than as a notice of dismissal. *See State v. Lee*, 197 Wis. 2d 959, 961, 542 N.W.2d 143 (1996). The supreme court, however, has no obligation to grant a motion for voluntary dismissal. *See State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 440a–440b, 477 N.W.2d 608 (1991). If the motion is filed before the filing of all briefs in the supreme court, the chief justice makes the decision. *Id*. If the motion is filed after all briefs are filed in the supreme court, the entire court makes the decision. *Id*.

As part of a joint stipulation for voluntary dismissal of an accepted petition for review, the supreme court may vacate the underlying decisions of the court of appeals and the circuit court. *See, e.g.*, *Mason Shoe Mfg. Co. v. Firstar Bank*, 227 Wis. 2d 244, 596 N.W.2d 373 (1999). The supreme court rejected a proposed amendment to Wis. Stat. § 809.18 that would have prohibited parties from stipulating to such vacaturs. *See* Wis. Sup. Ct. Order 01-15, 2003 WI 94, 261 Wis. 2d xxxvii (July 2, 2003) (denying in part petition for provision regarding stipulated reversal or stipulated vacatur of a lower court decision). While *Mason Shoe* addressed the issue in the supreme court only, the discretionary power of an appellate court to vacate or reverse a lower court decision as part of a voluntary dismissal should be available in the court of appeals, as well as in the supreme court.

The court of appeals has discretion to reinstate an appeal after a voluntary dismissal, particularly when a cross-appeal remains before the court. *See State v. Thiel*, 171 Wis. 2d 157, 159, 491 N.W.2d 94 (Ct. App. 1992). Such reinstatement may take place, however, only at the appellant's request. *Lee*, 197 Wis. 2d at 972.

Supplement Chapter 6
Parties to the Appeal

Book section supplemented: 6.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

6.1 Scope

Pages 1–2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 6
Parties to the Appeal

I. Scope
[§ 6.1]

The principal parties to an appeal are the appellant, who challenges the order or judgment on appeal, and the respondent, who takes a position adverse to the appellant. This chapter covers the status of appellants and respondents, as well as other parties, including cross-appellants, cross-respondents, and intervening parties. It also covers nonparties—specifically, amici curiae (i.e., friends of the court).[1]

II. Who May Appeal? [§ 6.2]

The rules of appellate procedure do not provide a satisfactory definition of an "appellant." Wis. Stat. § 809.01(2) merely states that an appellant is "a person who files a notice of appeal." The rules do not indicate who may file a notice of appeal.

Before the 1977 reorganization of the court system and the consequent revision of the statutes and rules of appellate procedure, Wis. Stat. § 817.10 (1975) provided that any judgment or order was reviewable by a "party aggrieved." In *Mutual Service Casualty Insurance Co. v. Koenigs*, 110 Wis. 2d 522, 329 N.W.2d 157 (1983), Chief Justice Heffernan stated that, although the "party aggrieved" language was omitted from the rules following the judicial reorganization, the elimination of the phrase was not intended to change prior law that a person had to be aggrieved by a judgment or order to be able to appeal. The party aggrieved language was deleted because "it was considered merely to state a fundamental and well understood concept upon which standing to appeal was predicated." *Id*. at 526.

No illuminating judicial definitions of party aggrieved exist, perhaps because, as Chief Justice Heffernan observed, it is a fundamental and well-understood concept. A court of appeals decision has stated that, for a person to appeal, the order or judgment must bear directly and injuriously upon the interests of the appellant; the appellant must be adversely affected in some appreciable manner. *Tierney v. Lacenski*, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983). The requirement that a party be "adversely affected" may, under some circumstances, prevent a party from appealing if the requesting party has been granted favorable relief, even though that relief is not what the party requested. *See Snopek v. Lakeland Med. Ctr.*, 215 Wis. 2d 539, 544–46, 573 N.W.2d 213 (Ct. App. 1997), *rev'd on other grounds*, 223 Wis. 2d 288, 588 N.W.2d 19 (1999).

Although the concept is fundamental, the term "aggrieved party" is somewhat of a misnomer because a person may be an aggrieved party even though the person was not a named party in the underlying action. *See Miller v. Lighter*, 21 Wis. 2d 401, 403, 124 N.W.2d 460 (1963). A person aggrieved has a substantial interest adverse to the judgment; the interest may either be direct or stem from privity created by succeeding to the rights of a person against whom the judgment was rendered. For example, a successful bidder at a foreclosure sale has the standing of an appellant to appeal a circuit court order refusing to confirm the sale. *Gumz v. Chickering*, 19 Wis. 2d 625, 121 N.W.2d 279 (1963). Similarly, a third-party beneficiary to a contract, a beneficiary under a will, or a party creditor may constitute a party aggrieved for the purposes of appeal. To be an aggrieved party with standing to appeal an administrative disposition, a person need not have been a party to the original administrative proceeding. *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cnty. Bd.*, 125 Wis. 2d 387, 390–91, 373 N.W.2d 450 (Ct. App. 1985), *aff'd*, 131 Wis. 2d 101, 388 N.W.2d 593 (1986). Note, however, that a person who could have participated in the proceedings below but chose not to might be precluded from appealing the final order or judgment concluding those proceedings. *See In re Ambac Assurance Corp.*, 2012 WI 22, ¶ 36, 339 Wis. 2d 48, 810 N.W.2d 450.

A change in status may prevent a person from seeking review. *See State v. Zien*, 2008 WI App 153, ¶ 20, 314 Wis. 2d 340, 761 N.W.2d 15 (holding that former attorney general had no standing to personally appeal judgment in action she brought in former capacity as attorney general).

Codefendants have standing to appeal an order dismissing other defendants, even though there were no cross-claims, on the ground that this increases the potential liability of the remaining defendants. *See Weina v. Atlantic Mut. Ins. Co*., 177 Wis. 2d 341, 345–46, 501 N.W.2d 465 (Ct. App. 1993). Regarding third-party defendants, see *Koller v. Liberty Mutual Insurance Co*., 190 Wis. 2d 263, 526 N.W.2d 799 (Ct. App. 1994).

An attorney sanctioned in an action in which he or she represents one of the parties must appeal personally if the attorney wishes to challenge the sanction. The attorney's client has no standing as an aggrieved party to appeal on behalf of the attorney. *Ziebell v. Ziebell*, 2003 WI App 127, 265 Wis. 2d 664, 666 N.W.2d 107. The person holding a power of attorney for an incompetent person may appeal on behalf of that person. *Knight v. Milwaukee Cnty. (In re Guardianship & Protective Placement of Muriel K.)*, 2002 WI 27, ¶¶ 41–42, 251 Wis. 2d 10, 640 N.W.2d 773.

Although the term "aggrieved party" has been liberally construed, an appeal will be dismissed if a party is unable to show that he or she has suffered some appreciable adverse effect because of the order or judgment. *See La Crosse Tr. Co. v. Bluske*, 99 Wis. 2d 427, 428–29, 299 N.W.2d 302 (Ct. App. 1980).

A person who was a party in the circuit court but who chooses not to participate in an appeal is not entitled later to enjoy the fruits of a successful appeal taken by another party. *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶ 16, 310 Wis. 2d 230, 750 N.W.2d 492.

III. Parties Defined [§ 6.3]

A. In General [§ 6.4]

The parties to an appeal are the appellant, co-appellant, cross-appellant, respondent, and cross-respondent.

B. Appellant [§ 6.5]

An *appellant*, as discussed in section 6.2, *supra*, is a person aggrieved by an order or judgment. An appellant initiates the appeal by filing the notice of appeal.

C. Co-appellant [§ 6.6]

A *co-appellant* is a person who files a notice of appeal in an action or proceeding in which a notice of appeal has already been filed by another person whose interests are not adverse. Wis. Stat. § 809.01(5). A co-appellant must also be aggrieved by the order or judgment being appealed.

D. Respondent [§ 6.7]

A *respondent* is a person whose interests are adverse to those of the appellant (and co-appellant, if any). Wis. Stat. § 809.01(29). A respondent is usually the party that prevailed in the circuit court and is sometimes referred to as an "appellee," although the Wisconsin Statutes do not use this term.

Sometimes it is not possible for a party to know if it is adverse to the appellant, and thus a respondent on appeal, until the appellant's brief is filed. This is recognized in Wis. Stat. § 809.19(3)(a)3., which provides that, within the time limits for filing a respondent's brief, a person previously designated a respondent may file a statement with the court that it will not be filing a brief because its interests are not affected by the issues raised in the appellant's brief or because its interests are adequately represented in another respondent's brief.

E. Cross-appellant [§ 6.8]

A *cross-appellant* is a respondent who files a notice of cross-appeal. Wis. Stat. § 809.01(8). A cross-appellant usually has prevailed on one issue in the circuit court but has lost on another issue. (The procedure for filing a cross-appeal is discussed in section 8.3, *infra*.)

F. Cross-respondent [§ 6.9]

The statutes do not specifically define *cross-respondent*, but that is nonetheless the status of an appellant with an interest adverse to a party taking a cross-appeal. In cases involving cross-appeals, the parties are normally designated appellant and cross-respondent, and respondent and cross-appellant.

IV. Intervenors and Amicus Curiae [§ 6.10]

A. In General [§ 6.11]

The rules of appellate procedure provide for persons who are not parties to participate in an appeal if they have a recognizable interest in the appeal. Wis. Stat. § 809.13 allows a nonparty to intervene and participate as a party. Wis. Stat. § 809.19(7) allows a nonparty to participate as an amicus curiae. As a general matter, an intervenor must have a specific, personal interest in the appeal,

whereas the interest of an amicus can be more general. A person who could have appealed as of right cannot participate in an appeal as an amicus or intervenor if that person participated as a party in the circuit court. *City of Madison v. Wisconsin Emp. Rels. Comm'n*, 2000 WI 39, ¶¶ 9–10, 12, 234 Wis. 2d 550, 610 N.W.2d 94. A nonparty to the circuit court action may participate as an intervenor in an appeal brought by a party, even after the time for appeal has passed. *Id*. ¶ 12. *But see Ziebell v. Ziebell*, 2003 WI App 127, ¶ 10, 265 Wis. 2d 664, 666 N.W.2d 107 (holding that aggrieved person who could have filed notice of appeal lacked right to intervene in appeal).

B. Intervenors [§ 6.12]

Wis. Stat. § 809.13 states that a person seeking to intervene in an appeal should file a petition with the appellate court. Any existing party may file a response within 11 days after service of such a petition.

A petition to intervene may be granted if it shows that the petitioner's interest satisfies the requirements of subsection (1), (2), or (2m) of Wis. Stat. § 803.09, which governs intervention in the circuit court. Under Wis. Stat. § 803.09(1), intervention is mandatory when a person claims and demonstrates an interest in the subject matter of the appeal and is so situated that disposition of the appeal might impair or impede the person's ability to protect that interest unless the interest is already adequately represented by existing parties. Under Wis. Stat. § 803.09(2), intervention is discretionary when a petitioner's claim or defense and the appeal have a question of law or fact in common. Finally, Wis. Stat. § 803.09(2m) provides that "the assembly, the senate, and the legislature may intervene … as a matter of right" in cases challenging the constitutionality, construction, or validity of a statute or in cases challenging a statute as violating or preempted by federal law.

Intervention at the appellate level should be infrequent because it will ordinarily have occurred in the circuit court. Indeed, a major issue in any attempt at appellate intervention will be why intervention did not occur before appeal.

Whether intervention is of right or permissive, Wis. Stat. § 803.09 requires the petition to be timely. *Milwaukee Sewerage Comm'n v. DNR*, 104 Wis. 2d 182, 186, 311 N.W.2d 677 (Ct. App. 1981). The burden is on the petitioner to show circumstances justifying delay in attempting intervention. *Id*.

A petition to intervene should clearly and completely set forth the facts and issues in the case. Mere conclusory statements about the nature of the case and the interests of the petitioner are insufficient because analyzing the substantive criteria for intervention set forth in Wis. Stat. § 803.09(1) and (2) is impossible in a factual vacuum.

The rules governing intervention, although phrased in terms of appeal, apply equally to other appellate court proceedings, such as cases involving supervisory jurisdiction. Robert J. Martineau & Richard R. Malmgren, *Wisconsin Appellate Practice* 57 (1978).

C. Amicus Curiae [§ 6.13]

A person who has an interest in the subject matter of an appeal, but fails to meet the criteria for intervention, may file a motion requesting permission to file an amicus curiae brief pursuant to Wis. Stat. § 809.19(7). The motion must identify the interest of the amicus and state why the court should welcome a brief discussing that interest. As with a petition to intervene—indeed, as with any motion or petition filed in an appellate court—the motion should always provide sufficient facts to allow the court to reach an informed decision. A person or organization that acted as an amicus in the circuit court should state this fact in the motion to file an amicus brief at the appellate level.

Generally, appellate courts look favorably on requests to file amicus briefs. In fact, appellate courts sometimes make sua sponte requests for organizations to submit amicus briefs, particularly if the parties' briefs are not helpful.

Although an individual may file an amicus brief, amicus briefs are ordinarily submitted by special or public interest groups that wish to state their positions on issues being appealed. For example, the State Bar of Wisconsin was allowed to file an amicus brief in a case in which the ethics board had ordered an attorney, who was also a member of the University of Wisconsin System Board of Regents, to disclose the names of clients who paid him $1,000 or more during a given year. *DeBardeleben v. Ethics Bd.*, 112 Wis. 2d 324, 332 N.W.2d 826 (Ct. App. 1983). In another case, *Hansen v. A.H. Robins, Inc*., 113 Wis. 2d 550, 335 N.W.2d 578 (1983), the Wisconsin Academy of Trial Lawyers filed an amicus brief in an appeal concerning when a cause of action accrued under a statute

of limitation. A party with scant financial resources to prosecute or defend an appeal might consider asking an organization to participate as a sympathetic amicus curiae.

A motion to file an amicus brief must be filed no later than 14 days after the filing of a respondent's brief, Wis. Stat. § 809.19(7)(c), unless the motion is filed to support or oppose a petition for review or a petition for original action in the supreme court, in which case the motion must be filed within the time permitted for a response to the petition. Wis. Stat. § 809.19(7)(b). Often, the amicus brief is submitted simultaneously with the motion to file the brief. Indeed, the brief *must* be filed simultaneously with the motion if the brief is to be filed in the supreme court in support of a petition for review or petition for original action. *Id*. Information about the filing and form of an amicus brief is presented in section 11.27, *infra*.

V. Death of Party While Appeal Is Pending [§ 6.14]

If a party to an appeal dies while the appeal is pending, the personal representative may be substituted to carry on the proceedings. *See Stevens v. Jacobs*, 226 Wis. 198, 275 N.W. 555, 276 N.W. 638 (1937). Because Wis. Stat. § 809.84 states that the rules of civil procedure generally apply to appeals, it appears that Wis. Stat. § 803.10(1), which governs substitution of deceased parties at the trial level, is at least partially applicable. This statute makes clear that any party, as well as the representatives and successors of the deceased, may cause substitution.

One peculiarity at the appellate level when a potential respondent dies before an appeal is that the appellant may be held responsible for ensuring that a respondent exists to accept service of the notice of appeal. *Bond v. Breeding*, 234 Wis. 14, 290 N.W. 185 (1940). Wis. Stat. § 808.04(6) addresses this situation and provides that if no personal representative is appointed within 60 days after a party's death, an appellant may cause a personal representative to be appointed to act as respondent in the appeal. *See also supra* § 5.4 (appeal time when party to an action dies).

Supplement Chapter 7
Transcripts and the Record on Appeal

Book sections supplemented: 7.1 and 7.5

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2022–23 supplement.

7.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023; and all references to Wisconsin Supreme Court Rules (SCR) are current through supreme court orders filed before and in effect on Oct. 4, 2023.

7.5 Supplementing Record by Judicial Notice

Page 11: Added textual sentence and Hennessy *citation to end of second-to-last paragraph in section*

Sometimes judicial notice is mandated by statute. For example, courts must take notice of the common law and statutes of other states, the ordinances of counties and municipalities within the state, and the rules and regulations of state and federal agencies. Wis.

Stat. §§ 902.02, 902.03. Wisconsin does not, however, allow judicial notice of the laws of foreign countries; those laws must be proved as facts. *See Hennessy v. Wells Fargo Bank*, 2022 WI 2, ¶¶ 23–26, 400 Wis. 2d 50, 968 N.W.2d 684.

Chapter 7
Transcripts and the Record on Appeal

I. Scope
[§ 7.1]

The title of this chapter is somewhat misleading because a transcript, rather than being separate from a record on appeal, is part of the record. The transcript deserves special emphasis, however, because the obligation to request it is the appellant's, whereas the obligation to assemble and file the remainder of the record belongs to the clerk of the circuit court. This chapter outlines the steps in requesting the transcript, as well as the court reporter's obligations in preparing the transcript. The contents of the appeal record are also discussed, as are motions to correct or supplement the record on appeal to include items omitted by the clerk of circuit court. Finally, this chapter addresses judicial notice as a means of supplementing the record on appeal. [1]

Note. Reflecting that documents are electronically filed (e-filed) in the circuit courts, and that circuit courts e-file those records in the appellate courts, the Wisconsin Rules of Appellate Procedure use the word "transmit" to describe such filings in the appellate courts. Transmit means to file either with traditional methods (paper filing) or by e-filing. *See* Wis. Stat. § 809.01(31), (32). "Transmit" replaced the word "forward" in describing the act of sending circuit court documents such as the record to the appellate courts. *See, e.g.*, Wis. Stat. §§ 809.11(2), 809.15(4)(a). As noted in chapter 18, *infra*, e-filing of all documents in the court of appeals is required for all parties represented by counsel and by high-volume filers, while traditional filing is still allowed by self-represented parties.

II. Requesting and Filing Transcript [§ 7.2]

Within 14 days after filing a notice of appeal, the appellant must file a document called a *statement on transcript* with the clerk of circuit court. Wis. Stat. § 809.11(4)(b). For convenience, attorneys may wish to file the statement along with the notice of appeal.

The statement on transcript must inform the court either that no transcript is necessary for prosecution of the appeal or that transcripts have been requested from the court reporter. In most appeals, a complete or partial transcript will be necessary. In these cases, the statement on transcript must include a certification, signed by the court reporter, showing that the transcript has been requested and arrangements for payment have been made for both the original and copies for all parties. In practice, the court reporter generally will provide a "wet" signature on the certification, which the attorney will scan before filing electronically. The statement must also include the date the transcript was requested and the date it will be served on the parties. Wis. Stat. § 809.11(4). A sample statement on transcript is included in appendix E, *infra*.

Once a proper statement on transcript has been filed, the burden of preparing, timely filing, and serving the transcript is on the court reporter. The transcript must be filed and served on all parties no more than 60 days after requested. Wis. Stat. § 809.11(7)(a). The reporter may move the court for an extension, which will be granted if good cause is shown. Wis. Stat. § 809.11(7)(c). Illness and other reasonable absences from work are examples of good cause; excessive workload is generally not considered good cause for an extension of time.

In appeals from orders in an electronics and information technology manufacturing zone case under Wis. Stat. § 809.104, there are expedited five-day periods for requesting a transcript, filing the statement on transcript, and preparing the transcript.

Wis. Stat. § 809.11(7)(d) provides for sanctions against a reporter who fails to timely file a transcript. Reporters who move from the state present a special problem that is not adequately remedied by the sanctions in Wis. Stat. § 809.11(7)(d). As it stands now, because appeals will not be decided until the requisite transcripts are filed, the court of appeals must alternately plead with, threaten, and cajole reporters who have left the state.

When requesting transcripts, it is important for the attorney to contact all court reporters who have worked on the case. Over the course of proceedings, it is sometimes difficult to notice or remember whether multiple reporters were involved. Any delays occasioned by failure to contact all reporters are the appellant's responsibility and may lead to the imposition of sanctions under Wis. Stat. § 809.83(2). This is particularly true if missing transcripts are discovered after the record has been filed and the briefing process is thereby delayed.

A partial transcript should not be requested in a case challenging the sufficiency of the evidence. In the absence of a transcript (or in the presence of a partial transcript), the court of appeals will assume that every fact essential to sustain the circuit court is supported by the circuit court record. *T.W.S., Inc. v. Nelson*, 150 Wis. 2d 251, 254–55, 440 N.W.2d 833 (Ct. App. 1989); *Haack v. Haack*, 149 Wis. 2d 243, 247, 440 N.W.2d 794 (Ct. App. 1989). Similarly, the appellate court will not find a misuse of the circuit court's discretion when the appellant fails to provide a transcript or a decision explaining the disposition. *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶ 35, 298 Wis. 2d 468, 727 N.W.2d 546. A "minute sheet" (minute record) for a circuit court hearing ordinarily will not be an adequate substitute for a transcript. *See id.*; *see also* SCR 71.02.

Within 14 days after service of the appellant's statement on transcript, other parties to the appeal may file in the court of appeals a designation of any additional portions of the transcript they believe are necessary for proper disposition of the appeal. Wis. Stat. § 809.11(5). Within 14 days after any request for additional portions of the transcript, the appellant must file in the circuit court a new statement on transcript covering the additional material. If the appellant fails to do so, the party requesting the addition may, within 14 days after the appellant's failure or refusal, request the portions of the transcript by filing a statement on transcript in the circuit court or file a motion with the circuit court for an order requiring the appellant to do so. *Id.*

The statement on transcript is an important document. It not only indicates that the transcripts have been requested, it shows that the appellant is serious about the appeal and is taking the necessary steps to prosecute it. Failure to file a statement on transcript is an early sign that the appellant is not prosecuting the appeal; for this reason, the appeal will be dismissed pursuant to Wis. Stat. § 809.83(2) if, after issuance of a delinquency notice, the statement is still not filed.

Note. As a substitute for the former designation of the reporter's "original notes" as the basis for the transcript, SCR 61.09 now defines the official record of court proceedings as the "verbatim record," which is defined in SCR 71.01(3) as the record made not only by stenographic reporting, but also by voice reporting, monitored digital audio recording, or other means approved by the director of state courts. *See also* SCR 71.03(3). The supreme court rules clarify that the resulting transcript, not the verbatim record itself, constitutes the official record of the proceedings. SCR 71.03(2). The verbatim record should not be confused with the larger appellate record, of which the transcript is but a part.

III. Composing and Compiling Record [§ 7.3]

The duty to compile the record for appeal lies with the clerk of the circuit court. Wis. Stat. § 809.15(2). Unless the parties stipulate to the contrary, the record consists of the following items:

1. The initiating document by which the action or proceeding was commenced;

2. Proof of service of summons or other process;

3. Answer or other responsive pleading;

4. Instructions to the jury;

5. Verdict or findings of the court, and the order based thereon;
6. Opinion of the court;

7. Final judgment;

8. Order made after judgment relevant to the appeal and documents on which the order is based;

9. Exhibits, whether or not received in evidence, except that oversize exhibits (i.e., those that are more than 8½ inches by 11 inches) will not be included unless requested by a party;

10. Any other document filed in the court and requested by a party to be included in the record;

11. Notice of appeal;

12. Bond or undertaking;

13. Transcript of the verbatim record of the proceedings; and

14. Certificate of the clerk of the circuit court.

Wis. Stat. § 809.15(1)(a).

Before transmitting the record to the court of appeals and at least 10 days before the deadline for filing the record, the clerk of the circuit court must notify the parties that the record has been assembled and is available for inspection. Wis. Stat. § 809.15(2). A list of the documents constituting the record must be included with this notice. *Id.*

Attorneys should carefully inspect the list of record items and, if necessary, the record itself to ensure the record is sufficient to support the case on appeal. Because the clerk of the circuit court will paginate the record, it is also advisable for the attorneys to numerically conform their versions of the record with the court's to ensure that record citations in the briefs will be accurate.

It is the appellant's duty to see that the record is sufficient for the court to review the issues raised on appeal. *State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). The court of appeals is bound by the record as it comes to the court. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). When the appeal is brought on an incomplete record, the appellate court will assume that every fact essential to sustain the circuit court's decision is supported by the record. *Gaethke v. Pozder*, 2017 WI App 38, ¶ 36, 376 Wis. 2d 488, 899 N.W.2d 381 (holding that appellants' failure to include transcript of oral decision rendered them unable to demonstrate circuit court error).

Note. A record created for postjudgment motions will not be part of the record that the appellate court reviews when it reviews an appeal from the underlying final order. *Smiljanic v. Niedermeyer*, 2007 WI App 182, ¶ 17, 304 Wis. 2d 197, 737 N.W.2d 436.

When reviewing the record, the parties should ascertain that it complies with Wis. Stat. §§ 801.19(2)(i) and 801.21(9), according special treatment to protected information (Social Security numbers, employer or taxpayer identification numbers, financial account numbers, driver license numbers, and passport numbers) and confidential documents. In most cases, these types of information should have been identified and protected by redaction or sealing in the circuit court before the appeal. The director of state courts maintains a list of commonly filed confidential documents to assist compliance with these rules. Wis. Stat. § 801.20(1); *see* Wis. Ct. Sys., *Services for Attorneys, Protecting Confidential Information*, https://www.wicourts.gov/services/attorney/redact/index.htm (last updated Sept. 7, 2021). In addition, the parties should be aware that the transcript may contain such protected information. In that case, any person affected may file a motion in the circuit court to redact the information; if the court grants the motion, the court reporter must prepare at no extra cost a redacted version for inclusion in the record, in which case the original, unredacted version will not be accessible to the public. Wis. Stat. § 801.19(4)(a), (b), (c).

Attorney involvement in compiling the record is crucial because the list in Wis. Stat. § 809.15(1)(a) of items composing the record is subject to interpretation. For example, Wis. Stat. § 809.15(1)(a)8. requires the inclusion of postjudgment orders "relevant to the appeal," not all postjudgment orders. In addition, certain exhibits will be included only upon request of a party. Wis. Stat. § 809.15(1)(a)9. Similarly, the catchall provision, Wis. Stat. § 809.15(1)(a)10., allows any other document filed with the court, such as trial briefs and correspondence, to be filed upon request. Because issues cannot be raised for the first time on appeal (*see supra* § 3.4), inclusion of such material may be crucial to avoid claims of waiver or forfeiture. It is advisable to determine what items the record should contain and contact the circuit court clerk before receipt of the notice of assembly of the record to ensure that desired items are included and delay is minimized.

Although Wis. Stat. § 809.15(1)(a) is flexible in allowing the filing of any document filed in the circuit court, it is inflexible in excluding from the record any item that has not been filed in the circuit court. Documents such as correspondence not filed or presented in the circuit court are not allowed in the record, absent a stipulation by the parties.

The record, including the transcript, must be electronically transmitted to the court of appeals within 20 days after filing the transcript in the circuit court (or within 20 days after the filing of additional portions, if requested pursuant to Wis. Stat. § 809.11(5)) or within 20 days after filing a statement that no transcript is necessary. Wis. Stat. § 809.15(4)(a). In no event may the filing of the record occur more than 90 days after the filing of the notice of appeal unless the appellate court enlarges the time for preparing either the record or the transcript. Wis. Stat. § 809.15(4)(b). One of the greatest causes for delay in the filing of the record is a delay in the filing of the transcript.

The attorney for an appellant may be able to reduce the time that elapses between the filing of the notice of appeal and the transmittal of the record by taking the following steps:

1. File the statement of transcript along with the notice of appeal, rather than waiting the 14 days allowed.

2. Carefully select only those portions of the transcript actually necessary to dispose of the issues being appealed.

3. Ensure that the record is properly composed, paying particular attention to identifying exhibits and other documents that the clerk of circuit court need not include.

4. Contact both the court reporter(s) and the clerk of the circuit court to urge expeditious performance of their respective duties in filing the transcript and transmitting the record.

Another way to avoid delay in transmitting a record is for the parties to stipulate to the facts and issues essential to a decision on appeal, in lieu of relying on a record. This procedure is permitted under Wis. Stat. § 809.15(5). The approach is rarely used, however, and may be inadvisable. *See, e.g.*, *Ginkowski v. Ginkowski*, 28 Wis. 2d 530, 536, 137 N.W.2d 403 (1965) (supreme court refused to review issue raised in oral argument, holding that court was limited to issues as they appeared in agreed statement).

IV. Motions to Supplement or Correct Record [§ 7.4]

If the record, including the transcript, is defective in any way or omits materials essential to an understanding of what occurred in the circuit court, a party may "move the court in which the record is located to supplement or correct the record." Wis. Stat. § 809.15(3). The motion must be served on all parties. Wis. Stat. § 809.80(2). Most circuit court clerks will supplement or correct the record upon a written request from counsel. Motions become necessary if the request is objected to by opposing counsel, or if the need to correct or supplement is discovered after transmittal of the record to the court of appeals. Whether by written request or motion, service is deemed effective upon e-filing a request or motion with the appropriate court. *See* Wis. Stat. § 809.801(4)(c).

If a problem in the record is detected before its transmittal, the motion should be filed in the circuit court pursuant to Wis. Stat. § 809.15(4)(c). The filing of the motion stays transmittal of the record until the motion is determined. Wis. Stat. § 809.15(4)(c). If the problem is detected after transmittal, the motion should be filed with the clerk of the appellate court. Because the clerk of the circuit court must give notice of the record's availability for inspection at least 10 days before filing it, *see* Wis. Stat. § 809.15(2), the alert attorney should file the motion to supplement or correct in the circuit court. If, however, the motion is filed in the court of appeals, it should be filed as soon as possible. Motions filed late in the appellate process are scrutinized more closely than motions filed shortly after transmittal of the record. If a motion to correct or supplement the record is filed, that motion tolls all appellate court time periods. *See* Wis. Stat. § 809.14(3)(b).

The most common type of supplemental motion seeks to include a document that was filed in the circuit court but omitted from the record when the circuit court clerk compiled the record. This type of motion is routinely granted unless the court feels it was not timely brought and might delay disposition of the appeal. One sure way to earn the ill will of the appellate court is to discover the need for an additional, unprepared transcript in the middle of the briefing schedule. Unless there is good reason for having taken so long to discover the missing transcript, the motion may be denied, and an issue on appeal thereby foreclosed.

Less commonly, motions to correct seek to correct actual errors in portions of the record. These motions may present difficult factual problems that an appellate court is ill-prepared to resolve. Unless the parties can stipulate as to the correction, these matters often must be remanded to the circuit court for fact-finding. To avoid delay, it is therefore important to bring motions of this nature before transmittal, while the record is still in the circuit court.

Several cases address how to supplement a record made defective by missing reporter's notes. The general procedure is outlined in *State v. De Leon*, 127 Wis. 2d 74, 79, 377 N.W.2d 635 (Ct. App. 1985). The first step should be an attempt by the parties to stipulate as to the missing testimony. *Id.* If no satisfactory resolution can be obtained by supplementary sources, such as the judge's notes or even a bystander's bill of exceptions, a new trial may be necessary, because otherwise the appellant is effectively denied the right to appeal. *See State v. Perry*, 128 Wis. 2d 297, 307, 381 N.W.2d 609 (Ct. App. 1985), *aff'd*, 136 Wis. 2d 92, 401 N.W.2d 748 (1987). Of course this is not an issue if there has been electronic reporting in addition to the traditional stenographic reporting. *See* SCR 71.03(3).

The court must keep the verbatim record, as authorized under SCR 71.01(3), for 10 years. SCR 72.01(47); *see supra* § 7.2. Although destruction of a recording of circuit court proceedings, a transcript, or notes after 10 years should not be a problem for parties in civil appeals, it can be in criminal cases in which a defendant's pursuit of postconviction relief might extend for a longer period. *See State v. Pope*, 2019 WI 106, 389 Wis. 2d 390, 936 N.W.2d 606, *cert. denied*, 141 S. Ct. 272 (2020); *see also infra* § 19.11.

The content of a motion to supplement or correct the record is dictated by Wis. Stat. § 809.14, which covers general motion procedure in the court of appeals. Wis. Stat. § 809.14 requires the motion to state the relief sought and the grounds on which the motion is based. Thus, the motion should state the problem with the record; what is needed to supplement or correct the record; why supplementation or correction is important or essential; and, if the motion is brought late in the appellate process but with good cause for the delay, why the motion was not brought earlier. Like any motion or petition, the motion should also state the facts that are necessary to an understanding of the motion.

A motion to correct or supplement the record may be heard by telephone conference. Wis. Stat. § 809.15(3). This will be done rarely, if ever, because motions must still be filed and the court generally decides all motions on the basis of written arguments.

V. Supplementing Record by Judicial Notice
[§ 7.5]

Although the facts on appeal are generally limited to those in the record, attorneys should remember that a court may take judicial notice of a wide variety of facts. In general, notice may be taken of facts that are either generally known within the jurisdiction of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Wis. Stat. § 902.01.

The extent to which judicial notice is taken at the appellate level is surprisingly high, so an attorney who fails to recognize that the trial record may be supplemented by judicial notice is neglecting a potentially valuable instrument. This is particularly true when the facts are legislative facts bearing on policy decisions. Courts are more likely to judicially notice legislative facts, such as general sociological or economic data, than adjudicative facts, which are facts bearing directly on particular parties in particular controversies. George R. Currie, *Appellate Courts' Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 Wis. L. Rev. 39.

General categories of facts that courts may judicially notice include the following:

1. Scientific facts, *compare State v. Hanson*, 85 Wis. 2d 233, 241–43, 270 N.W.2d 212 (1978) (refusing judicial notice of accuracy and reliability of moving radar absent testimony of authoritative scientists or showing of irrefutable scientific fact), *with Fringer v. Venema*, 26 Wis. 2d 366, 372–73, 132 N.W.2d 565, 133 N.W.2d 809 (1965) (holding that whether bull under six months of age could fertilize 15 heifers was subject to judicial notice if verifiably certain);

2. Public records, *compare Dunlavy v. Dairyland Mut. Ins. Co.*, 21 Wis. 2d 105, 111, 124 N.W.2d 73 (1963) (taking judicial notice of records in office of secretary of state), *with State v. Christian*, 142 Wis. 2d 742, 746, 419 N.W.2d 319 (Ct. App. 1987) (stating rule that court cannot take judicial notice of its own records in another case);

3. Matters tending to show legislative intent, *see Thompson v. Allaert (In re Est. of Haese)*, 80 Wis. 2d 285, 297, 259 N.W.2d 54 (1977) (taking judicial notice of committee reports and studies);

4. Miscellaneous matters of common knowledge, *see Hirsch v. S.C. Johnson & Son*, 90 Wis. 2d 379, 384, 280 N.W.2d 129 (1979) (taking judicial notice of fact that plaintiff sports figure Elroy Hirsch, was still referred to as "Crazylegs" at the time of the supreme court's decision); *Beardsley v. City of Darlington*, 14 Wis. 2d 369, 374, 111 N.W.2d 184 (1961) (taking judicial notice of fact that large proportion of public has access to television); and

5. Well-known historical facts, *see West v. West (Estate of West)*, 231 Wis. 377, 389, 284 N.W. 565 (1939) (taking judicial notice of Great Depression between 1935 and 1936, and its effect on stocks and securities).

The easy accessibility of information on the internet provides many opportunities to request judicial notice. *See, e.g.*, *State v. Harvey*, 2001 WI App 59, ¶ 8, 242 Wis. 2d 189, 625 N.W.2d 892 (taking judicial notice of information provided on city's official website), *aff'd*, 2002 WI 93, ¶ 48 n.13, 254 Wis. 2d 442, 647 N.W.2d 189; *see also* Thomas J. McAdams, *Use of Internet Sources in Appellate Practice*, De Novo (State Bar of Wis. App. Prac. Sec.), Winter 2004, at 8. Attorneys must be cautious, however, given the huge variety of websites and the variability of the information that they provide. *See* Molly McDonough, *In Google We Trust? Critics Question How Much Judges, Lawyers Should Rely on Internet Search Results*, A.B.A. J., Oct. 2004, at 30. The key is whether the particular website constitutes a source whose accuracy cannot reasonably be questioned under Wis. Stat. § 902.01.

Sometimes judicial notice is mandated by statute. For example, courts must take notice of the common law and statutes of other states, the ordinances of counties and municipalities within the state, and the rules and regulations of state and federal agencies. Wis. Stat. §§ 902.02, 902.03.

The general method of seeking judicial notice at the appellate level is to do so in the briefs. Copies of any pertinent materials should be included in the appendix. This is particularly important if the material for which a party seeks notice is available only on the internet; websites often change, or even disappear, and leave no trace of their former content.

Supplement Chapter 8
Multiple Appeals

Book section supplemented: 8.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

8.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36, and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 8
Multiple Appeals

I. Scope
[§ 8.1]

There are two types of multiple appeals. One type occurs when a single appeal involves multiple appellants, such as co-appellants or cross-appellants. The other type occurs when an appeal involves separate cases that were individually appealed, but consolidated for joint briefing or disposition. [1]

II. Joint Appeals and Co-appeals [§ 8.2]

When two or more persons in a single case decide to appeal a final order or judgment, they may do so either jointly or independently. In either event, the manner of commencing the appeal is that described in chapter 5, *supra*.

Joint appellants are parties whose interests make joinder practicable and who elect to proceed as a single appellant. Wis. Stat. § 809.10(2)(a). This means that, although they may file a joint notice or separate notices of appeal, they file a single brief.

Co-appellants are parties whose interests are not adverse but who elect to file separate notices of appeal and separate briefs. Wis. Stat. §§ 809.10(2)(a). If a person files a notice of appeal after another person has filed a notice of an appeal in an action or proceeding, and the second filer does not have interests adverse to the first appellant, the second filer is deemed a co-appellant. *See* Wis. Stat. § 809.01(5).

III. Cross-appeals [§ 8.3]

A cross-appellant is a respondent who seeks to reverse or modify a portion of a judgment or order on appeal or another judgment or order entered in the same action or proceeding. *See* Wis. Stat. § 809.01(8). A cross-appellant must file a notice of cross-appeal within the time for filing a notice of appeal under Wis. Stat. § 808.04, or within 30 days after the filing of the notice of appeal, whichever is later. Wis. Stat. § 809.10(2)(b). Stacking of cross-appeals—that is, taking a cross-appeal from a cross-appeal—is permissible. *Estate of Donnell v. City of Milwaukee*, 160 Wis. 2d 529, 534–35, 466 N.W.2d 670 (Ct. App. 1991). A cross-appellant has the same rights and obligations as an appellant under the rules of appellate procedure. Wis. Stat. § 809.10(2)(b). A cross-appellant must, therefore, file a docketing statement with the circuit court at the same time that the notice of cross-appeal is filed. *See* Wis. Stat. § 809.10(1)(d); *see also supra* § 5.21.

As with a notice of appeal, the time for filing a cross-appeal cannot be extended, and timely filing is essential to obtain jurisdiction. *Rossmiller v. Rossmiller*, 151 Wis. 2d 386, 389, 444 N.W.2d 445 (Ct. App. 1989); *see also* Wis. Stat. § 809.82(2). Consistent with this, the filing of a motion that, pursuant to Wis. Stat. § 809.14(3)(a), usually enlarges the time for performing any act required by the rules of appellate procedure, does not act to extend the time for filing a cross-appeal. *Rossmiller*, 151 Wis. 2d at 389–91.

As with ordinary notices of appeal, a notice of cross-appeal is filed with the clerk of circuit court and must identify the order or judgment being appealed. A copy of the notice must be sent to the clerk of the court of appeals and served on all parties. The cross-appellant must pay the required filing fee and any local fees. *See supra* § 5.20.

Like an appellant, a cross-appellant must file a statement on transcript pursuant to Wis. Stat. § 809.11(4); this statement must be filed within 14 days after filing the notice of cross-appeal. *See* Wis. Stat. § 809.11(6). If portions of the transcript in addition to those requested by the appellant are necessary, the cross-appellant must request them and show this in the statement on transcript by a certification signed by the court reporter indicating the date the transcripts were requested and the date they will be served. *See supra* § 7.2. Briefing procedures for cross-appellants are discussed in section 11.25, *infra*.

A respondent need not file a cross-appeal to obtain review of certain issues. A cross-appeal is essential only to the extent that the respondent seeks modification or reversal of a judgment or order. If the respondent simply seeks to have the appellate court correct circuit court errors that, if corrected, would support the order or judgment, a cross-appeal is unnecessary. *State v. Alles*, 106 Wis. 2d 368, 392–94, 316 N.W.2d 378 (1982). An appellate court's authority to correct such errors and the respondent's right to raise them are based on common law, not statute. *Id*.

So long as there is a valid appeal from a final order or judgment, a cross-appellant may use the cross-appeal procedure to challenge nonfinal orders as well as the final order or judgment on appeal. *B & B Invs. v. Mirro Corp.*, 147 Wis. 2d 675, 690, 434 N.W.2d 104 (Ct. App. 1988).

A respondent has no right to cross-appeal from an interlocutory order upon the granting of a petition for leave to appeal. *Fedders v. American Fam. Mut. Ins. Co.*, 230 Wis. 2d 577, 582, 601 N.W.2d 861 (Ct. App. 1999). Once leave to appeal is granted, a cross-appeal is possible only if the respondent files and the court of appeals grants a separate petition for leave to appeal. *Id*.

In *Kettle Moraine Hospital, Inc. v. Hale*, 129 Wis. 2d 373, 375–76, 385 N.W.2d 514 (Ct. App. 1986), the court held that in a multiple-defendant case in which the defendant found liable has appealed and the defendants not found liable have not, a cross-appeal by the plaintiff may challenge the dismissal of charges against the defendants who have not appealed. In this case, the court took a very broad view of the adversity necessary to be a respondent, holding that because the defendants found not liable necessarily had an interest adverse to the nondismissed defendant who appealed, they were properly respondents and thus fell within the ambit of the plaintiff's cross-appeal. *Id*.

A party that has filed a needless cross-appeal (i.e., one in which all that is sought is correction of an error that if corrected would not change the result) cannot recover costs for the cross-appeal. *Weber v. City of Cedarburg*, 125 Wis. 2d 22, 30 n.5, 370 N.W.2d 791 (Ct. App. 1985), *aff'd*, 129 Wis. 2d 57, 384 N.W.2d 333 (1986).

IV. Consolidated Appeals [§ 8.4]

An appellate court may consolidate separate appeals taken from separate actions or proceedings in the circuit court. Wis. Stat. § 809.10(3). Consolidation may occur on the appellate court's own motion, a motion of a party, or by stipulation of the parties. *Id*. The most common type of consolidation occurs in cases that involve the same parties, arose out of a single occurrence or set of circumstances, and were tried together. Consolidation of such cases prevents duplication of effort and is advisable in the interest of economy to both the parties and the court. In such cases, the court would likely order that the appeal be decided on one set of joint briefs and disposed of in one opinion.

Cases tried separately but involving the same parties and arising out of the same circumstances also are likely candidates for consolidation and joint briefing and disposition, so long as the time between filing of the appeals is not too long. An appellate court will be reluctant to unduly delay disposition of an appeal for the sole purpose of consolidating it with another case that is still in the circuit court.

Consolidation also may occur, generally on the court's own motion, in cases involving similar issues on which the court intends to make an important pronouncement. These are almost always issues of law. Consolidation in this situation ordinarily entails only joint disposition, not joint briefing. In fact, the parties may be unaware of the consolidation until the court releases its opinion.

In bringing a motion for consolidation, an attorney should emphasize the common factors in the cases. The motion should do more than state in conclusory terms that the cases have the same issues and parties. The issues and parties should be identified, the facts of the cases should be explained, and the reasons consolidation would benefit the parties and the court should be stated. A party should not hesitate to oppose a motion for consolidation if consolidation would cloud the issues or introduce extraneous issues or facts that could divert the court's attention.

A motion for consolidation should be made as early as possible, particularly if joint briefing is a possibility. The motion can be made at the time of filing the notice of appeal and should follow the general form prescribed in Wis. Stat. § 809.14. The motion must be filed in the office of the clerk of the court of appeals in Madison and served on all parties. Wis. Stat. §§ 809.80, 809.801.

Supplement Chapter 9
Appeals by Permission from Nonfinal Orders or Judgments

Book section supplemented: 9.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

9.1 Scope

Pages 1–2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023; and all references to the United States Code (U.S.C.) are current through Pub. L. No. 118-19 (Oct. 6, 2023).

Chapter 9
Appeals by Permission from Nonfinal Orders or Judgments

I. Scope
[§ 9.1]

The reorganization of the Wisconsin court system replaced a long list of appealable orders and judgments with a simple test allowing appeals as of right only from final orders or judgments. *See supra* § 4.4. The corollary to this limitation on appeals as of right is to allow appeals from nonfinal orders and judgments with permission of the court of appeals. [1]

This chapter discusses the criteria for permissive appeals. The procedure for filing a petition for leave to appeal, along with the provisions for temporary relief pending a decision on the petition, are also covered.

II. Criteria for Permissive Appeals [§ 9.2]

A. Factors Under Wis. Stat. § 808.03(2) [§ 9.3]

Nonfinal orders and judgments may be appealed by permission of the court. Wis. Stat. § 808.03(2). As discussed in sections 4.5–.8, *supra*, a final order or judgment is one that disposes of the entire matter in litigation as to one or more of the parties in an action or special proceeding. Thus, a nonfinal order or judgment is one that leaves some portion of the litigation remaining as to all parties.

Before a person may seek permission of the court of appeals to appeal a nonfinal order or judgment, the order or judgment must be entered. Wis. Stat. § 809.50. This means that the order or judgment must be in writing and on file with the clerk of the circuit court. Permission to appeal must be sought within 14 days after entry. *Id*.

Wis. Stat. § 808.03(2) allows the court of appeals to grant an appeal from a nonfinal order or judgment if the court determines that an appeal will do one of the following:

1. Materially advance the termination of the litigation or materially clarify further proceedings in the litigation;

2. Protect the petitioner from substantial or irreparable injury; or

3. Clarify an issue of general importance in the administration of justice.

These criteria are broad enough to cover almost any order or judgment, depending on the court of appeals' inclination to grant review. Attorneys may therefore be tempted to seek leave to appeal a wide variety of adverse, nonfinal circuit court orders and judgments. For example, if the circuit court denies a motion to dismiss or a motion for summary judgment, the losing party may think that an appeal from the order should be granted because the appeal would materially advance the termination of the litigation or at least clarify the litigation and protect against substantial injury by preventing a needless trial. The court of appeals rejects this sort of logic, however. The court does not view the necessity of trial as an irreparable or substantial injury, nor does the court accept conclusory allegations that an appeal will materially advance the termination of the litigation.

B. Substantial Likelihood of Success on Merits [§ 9.4]

The most important criterion for determining whether an appeal should be granted is not expressly included among the statutory criteria listed in Wis. Stat. § 808.03(2), although it is implicit in those criteria. This consideration is whether the petition for leave to appeal shows a substantial likelihood of success on the merits. Only in this context can the general criteria listed in Wis. Stat. § 808.03(2) be given much significance. Likelihood of success on the merits is the first question the court will consider when responding to a petition for leave to appeal because the court will want to ensure that an appeal will not simply serve to delay and defeat the ends of justice, rather than expedite and clarify the proceedings. A petition for leave to appeal that does not show likely circuit court error will usually be denied.

Among the criteria set forth in Wis. Stat. § 808.03(2), the only one not substantially related to the consideration of success on the merits of the case is paragraph (c), which concerns whether the appeal will clarify issues of general importance in the administration of justice. This criterion addresses issues of policy and law that go beyond the confines of an individual case. An example would be a challenge to the constitutionality of a statute. If a case presents such an issue, the court of appeals may be less influenced by its view of the specific merits of the petitioner's position.

C. Policy Against Permissive Appeals [§ 9.5]

Regardless of the nature of the issues raised in a petition for leave to appeal, however, the court will not lightly grant the petition. This is consistent with a general policy of avoiding piecemeal disposal of litigation. *See, e.g.*, *State ex rel. A.E. v. Green Lake Cnty. Cir. Ct.*, 94 Wis. 2d 98, 101, 288 N.W.2d 125 (1980). It also recognizes the court of appeals' heavy caseload. Consistent with the policies of avoiding piecemeal litigation and limiting each case to one appeal, parties cannot obtain an appeal as of right from an interlocutory order by stipulating to the entry of a final judgment while reserving specific rights conditioned on the outcome of the appeal. *See Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 569 N.W.2d 45 (Ct. App. 1997).

The policy against granting interlocutory appeals is particularly strong in criminal prosecutions. Delays in that area are inimical to an effective criminal justice system. *A.E.*, 94 Wis. 2d at 102.

D. Specific Cases Favoring Permissive Appeal [§ 9.6]

In a few situations, the supreme court has found that the need for immediate review outweighs the normal policy against interlocutory appeals.

First, in recognition of the significance of the Double Jeopardy Clause and the harm a trial can cause under those circumstances, the supreme court has recommended that the court of appeals grant petitions for leave to appeal pretrial orders denying motions to dismiss on double-jeopardy grounds. *See State v. Jenich*, 94 Wis. 2d 74, 288 N.W.2d 114 (1980).

Second, the supreme court has recognized the importance of reviewing orders waiving juveniles into adult court; the court has urged that nonfinal orders granting waiver be reviewed by the court of appeals in the exercise of that court's discretion. *See State ex rel. A.E. v. Green Lake Cnty. Cir. Ct.*, 94 Wis. 2d 98, 105d, 292 N.W.2d 114 (1980), *reconsidering* 94 Wis. 2d 98, 288 N.W.2d 125 (1980). Presumably, this also would be true of reverse-waiver orders transferring a juvenile from adult court to juvenile court, which also are reviewable only by permission. *See State v. Dominic E.W.*, 218 Wis. 2d 52, 579 N.W.2d 282 (Ct. App. 1998). The court of appeals has followed these suggestions by adopting a policy of ordering full briefing when it receives petitions raising these issues.

In a third situation, the supreme court, exercising its superintending powers, went beyond recommending review and ordered the court of appeals to grant every petition for leave to appeal a circuit court order denying a claim of qualified immunity from a 42 U.S.C. § 1983 action if the order is based on an issue of law. *Arneson v. Jezwinski*, 206 Wis. 2d 217, 229, 556 N.W.2d 721 (1996). Use of the supreme court's superintending authority to require automatic granting of interlocutory review is disfavored and limited to cases in which review is required by the necessities of justice. *Lassa v. Rongstad*, 2006 WI 105, ¶ 84, 294 Wis. 2d 187, 718 N.W.2d 673.

The supreme court has also identified a number of cases in which permissive or interlocutory appeals would be "appropriate and justified." *See State v. Webb*, 160 Wis. 2d 622, 633 n.8, 467 N.W.2d 108 (1991). These include cases in which questions of law raised in preliminary proceedings will recur at trial, constitutional challenges to criminal prosecution, and challenges to subject-matter and personal jurisdiction. *Id.*; *see also State ex rel. Hass v. Wisconsin Ct. of Appeals*, 2001 WI 128, ¶ 10, 248 Wis. 2d 634, 636 N.W.2d 707. In fact, the supreme court has stated that errors at a preliminary hearing are waived if they are not raised by a petition for leave to appeal. *State v. Wolverton*, 193 Wis. 2d 234, 254, 533 N.W.2d 167 (1995).

As a general rule, however, the decision to grant a permissive appeal remains within the court of appeals' discretion. *See Jenich*, 94 Wis. 2d at 97a. The supreme court ordinarily will not review the court of appeals' decision because supreme court review would interfere with the discretion that Wis. Stat. § 808.03(2) vests in the court of appeals. *J.S.R. v. State (In the Int. of J.S.R.)*, 111 Wis. 2d 261, 262–63, 330 N.W.2d 217 (1983). The supreme court has refused to allow a litigant to bypass the court of appeals on the issue whether to grant a petition for leave to appeal. *Id.*

III. Form and Filing of Petition for Leave to Appeal [§ 9.7]

A. In General [§ 9.8]

Whether the review is called an "interlocutory," "discretionary," or "permissive" appeal, it is obtained by filing a petition for leave to appeal. Wis. Stat. § 809.50 sets forth the procedure; a sample petition is included in appendix E, *infra*.

The petition must be filed with the clerk of the court of appeals in Madison within 14 days after the entry of the order or judgment the petition seeks to review. Wis. Stat. § 809.50(1). *See generally infra* ch. 18 (discussing filing procedures). For a discussion of entry, see sections 4.16–.20, *supra*. The order or judgment must be in writing and on file in the office of the clerk of the circuit court. The petitioner must pay the statutory filing fee. Wis. Stat. § 809.25(2).

Because a petition for leave to appeal is not a notice of appeal, the 14-day period for filing may be extended by the court on its own motion or upon good cause shown by motion. Wis. Stat. § 809.82(2); *State v. Polashek*, 2002 WI 74, ¶ 16, 253 Wis. 2d 527, 646 N.W.2d 330; *see also supra* ch. 5 (discussing notice of appeal in appeals as of right). If the 14-day deadline has been missed, a motion to enlarge, along with the petition for leave to appeal, should be filed as soon as possible. A delay of more than a few days will likely result in denial of any extension.

B. Contents of Petition; Supporting Memorandum [§ 9.9]

The requisites for a petition for leave to appeal are set forth in Wis. Stat. § 809.50(1) as follows:

1. A statement of the issues;

2. A statement of the facts necessary to an understanding of the issues;

3. A statement showing that reviewing the judgment or order immediately, rather than on appeal from the final judgment in the case or proceeding, will materially advance the termination of the litigation, materially clarify further proceedings, protect a party from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice; and

4. A copy of the judgment or order sought to be reviewed.

In short, this means the petition must tell what the case is about, how the circuit court erred, and why the court of appeals should take jurisdiction before termination of the case.

The most important part of the petition for leave to appeal is the statement of facts. Without an adequate factual background, the petition is a disembodied argument with little relevance. Unless the facts are presented in a clear and complete fashion, it is often impossible to understand the issues, the complaint about the circuit court, or the desired result.

The best way to state the facts is in chronological order. Identify the parties. Tell how they became involved with each other and how the disagreement arose. Who started the proceedings? What has happened in the circuit court? What is the objectionable order or judgment? Be specific. Remember that the court of appeals has no record to fall back on if the statement of facts is insufficient.

Attach as exhibits any relevant documents, such as the complaint or the motion for summary judgment. Most important, attach the order or judgment sought to be appealed and any decision the circuit court may have issued with it. No matter what the issue, the circuit court's reasoning is important and will be one of the first things the court of appeals will examine in deciding a petition for leave to appeal. If the circuit court's decision was oral, attach a partial transcript or inform the court of appeals that a transcript has been ordered and will be filed by a specific date.

Neither the petition, nor any response, may exceed 35 pages if a monospaced font or handwriting is used or 8,000 words if a proportional serif font is used. Wis. Stat. § 809.50(1), (2).

The statement of issues generally should precede the statement of facts to supply a framework for recognizing the important facts. Simply list the individual complaints of error that will be revealed in the statement of facts. Clearly identifying the issues raised is important: a person who is granted the right to appeal a nonfinal order may raise in the subsequently filed briefs only those issues outlined in the petition. *State v. Aufderhaar*, 2004 WI App 208, ¶ 12, 277 Wis. 2d 173, 689 N.W.2d 674, *rev'd on other grounds*, 2005 WI 108, 283 Wis. 2d 336, 700 N.W.2d 4.

After stating the facts, the petition must bring the facts and issues together in a reasoned analysis, addressing why the court of appeals should take the case. Wis. Stat. § 809.50(1) allows an optional supporting memorandum to be filed. An appellate attorney should *always* file a supporting memorandum, although it need not be identified as such. Attorneys often merge the memorandum with the required statement showing that review is necessary and label this joint analysis "Statement Showing Necessity for Review."

Wis. Stat. § 809.50(1)(c) sets forth the general criteria that must be addressed in a petition for leave to appeal. As noted in sections 9.2–.6, *supra*, the court evaluates these criteria in the context of the merits of a given case. Consequently, the petitioner's analysis should address the merits of the case by a reasoned argument citing relevant authority. The most important points to cover are how the circuit court erred and how it should have ruled. Once this is done, the criteria for appeal frequently become almost superfluous. If the court of appeals concludes that the petition shows probable circuit court error and hence a likelihood of success on appeal, referring to the criteria of Wis. Stat. §§ 808.03(2) and 809.50(1)(c) becomes essentially a formality.

It is crucial to argue in the petition and supporting memorandum the merits that will later be argued on appeal. Not only is the court of appeals unlikely to grant petitions that fail to include such arguments, but the court also may grant summary relief on petitions that do. It is not unheard of for the court to grant a petition for leave to appeal and immediately reverse if the case is clear-cut.

Attorneys must remember, however, that the chances of being granted a permissive appeal are small. The court looks cautiously at such petitions, if only because they represent more potential appeals on an already overcrowded docket. The petitions most likely to be granted are those that show a great likelihood of success on appeal and those that present significant legal issues ripe for decision and not requiring factual exposition at trial.

C. Response to Petition [§ 9.10]

An opposing party in the circuit court must file a response to a petition for leave to appeal. Although Wis. Stat. § 809.50(2) might arguably be read as making a response optional, the court has rejected this interpretation. The only option afforded is that the response need not be accompanied by a supporting memorandum. A response, even if it is only a statement of agreement, must be filed.

D. Consideration by Court; Procedures After Grant of Petition [§ 9.11]

Upon examining the petition and response and an analysis prepared by the court's staff counsel, the court of appeals will issue an order either granting or denying the petition. There is no provision for oral argument. Note that if the underlying case is one that will be decided on appeal by a single judge pursuant to Wis. Stat. § 752.31(2), the decision on the petition for leave to appeal will ordinarily be made by the presiding judge. All other orders granting or denying petitions for leave to appeal are made by a three-judge panel. It is not necessary for the court of appeals to explain its decision to deny leave to appeal. *State v. Jendusa*, 2021 WI 24, ¶¶ 21–22, 396 Wis. 2d 34, 955 N.W.2d 777 (affirming order denying petition for leave on grounds that it did not satisfy criteria for permissive appeal).

The order granting a petition for leave to appeal may limit the briefing to only those issues that the court of appeals believes have merit. *State v. Aufderhaar*, 2004 WI App 208, ¶ 16, 277 Wis. 2d 173, 689 N.W.2d 674, *rev'd on other grounds*, 2005 WI 108, 283 Wis. 2d 336, 700 N.W.2d 4.

If the petition is granted, a copy of the order will be filed with the clerk of circuit court, where it will serve as a notice of appeal. Wis. Stat. § 809.50(3). From that point, matters proceed as if a notice of appeal had been filed. *Id*. Thus, the next step for the petitioner-appellant is the filing of a statement on transcript, as discussed in section 7.2, *supra*.

All successful petitioners must file a docketing statement in the court of appeals within 11 days after the date of the order granting the petition. *See* Wis. Stat. § 809.50(3); *see also infra* § 15.9.

IV. Relief Pending Petition for Leave to Appeal [§ 9.12]

As with an appeal, a petition for leave to appeal does not stay proceedings in the circuit court. A petitioner who desires a stay or any other relief pending disposition of the petition may request it in the petition. Wis. Stat. § 809.52. The request should be prominently placed, preferably in the title, which might read "Petition for Leave to Appeal and Request for Temporary Relief." If the request for temporary relief is buried in the body of the petition, the court might not recognize the need for swift action.

To determine whether temporary relief is needed, the court must know the dates the next proceedings are scheduled in the circuit court, the types of proceedings they are, and why they will harm the petitioner. The court also should be told about any other event that might require a stay and when the event will occur. Failure to provide factual information of this kind will cause the court to deny relief.

Although Wis. Stat. § 809.52 does not require that temporary relief be sought first in the circuit court, this is advisable as consistent with court of appeals practice and Wis. Stat. § 809.12. The petition should inform the court of appeals of any efforts to obtain relief in the circuit court.

A petition for leave to appeal is generally decided less than one month after filing. If the petitioner does not allege that an injury will occur by a specified date within that time period, the court will probably not act on a request for pending relief until it has decided the merits of the petition. Then it will either deny the petition, rendering the request moot, or grant the petition and decide the request at that time.

Supplement Chapter 10

Supervisory Relief in the Court of Appeals

Book section supplemented: 10.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

10.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 10
Supervisory Relief in the Court of Appeals

I. Scope
[§ 10.1]

Although it has become less important since appeals by permission were introduced, supervisory relief (such as mandamus and prohibition) continues to be available. The stringent standards for supervisory relief dictate that it rarely be sought. This chapter covers the standards that must be met to obtain supervisory relief, as well as the procedure for invoking the court of appeals' supervisory jurisdiction. The provision for temporary relief pending a petition for a supervisory writ also is considered. [1]

II. Supervisory Writs: Mandamus and Prohibition [§ 10.2]

Although the supervisory jurisdiction of the court of appeals encompasses a great number of writs, including certiorari and quo warranto, the two that a typical attorney is most likely to encounter are mandamus (to compel an act) and prohibition (to prevent an act). These two writs—now generally referred to as *supervisory writs*, *see State ex rel. CityDeck Landing LLC v. Circuit Ct. for Brown Cnty.*, 2019 WI 15, ¶ 26, 385 Wis. 2d 516, 922 N.W.2d 832—can be used almost interchangeably. *See State ex rel. Dressler v. Circuit Ct. for Racine Cnty.*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991) (stating that supervisory writ blends writ of mandamus with writ of prohibition); *see also In re Petition of Pierce-Arrow Motor Car Co.*, 143 Wis. 282, 285, 127 N.W. 998 (1910). While one attorney might seek to prohibit a court from acting in a given manner, another attorney facing the same type of case might seek mandamus to compel the court to act in a different manner.

The writs of mandamus and prohibition both require essentially the same standards, although the courts often state the requirements somewhat differently: (1) the circuit court has a plain duty and either has acted or has refused to act in violation of that duty, (2) there is no other adequate remedy, (3) grave hardship or irreparable harm will result, and (4) the petitioner promptly and speedily seeks relief. *CityDeck*, 2019 WI 15, ¶ 30, 385 Wis. 2d 516; *see also, e.g.*, *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 493–94, 305 N.W.2d 89 (1981) (mandamus); *State ex rel. Prentice v. Milwaukee Cnty. Ct.*, 70 Wis. 2d 230, 234–35, 234 N.W.2d 283 (1975) (prohibition). Early decisions suggesting that the use of supervisory writs was limited to correction of jurisdictional errors have been eroded, so that the controlling rule governing relief under the blended term

supervisory writ is that the petitioner must establish the four factors for relief regardless of whether the error is jurisdictional. *CityDeck*, 2019 WI 15, ¶ 28, 385 Wis. 2d 516.

Reflecting the fact that supervisory relief is available only when there is a clear legal right, a petition for supervisory relief is not available to obtain review of discretionary acts. *Dressler*, 163 Wis. 2d at 632.

A decision whether to grant supervisory relief is controlled by equitable principles, and the court may consider the interests of the public and third parties. *State ex rel. DNR v. Wisconsin Ct. of Appeals*, 2018 WI 25, ¶ 9, 380 Wis. 2d 354, 909 N.W.2d 114. The plain duty that is sought to be compelled must be one that is clear and unequivocal, and the responsibility to act must be imperative. *Id.* ¶ 11. A plain duty may exist even if the matter presents a novel issue. *Id*.

Since the rules of appellate procedure created a procedure for appealing nonfinal orders, *see supra* ch. 9, attorneys have wondered whether the availability of a petition for leave to appeal a nonfinal judgment or order constitutes an adequate remedy that can be used instead of a petition for a supervisory writ. One authority suggests that it will be difficult in most cases to show that relief by leave to appeal is unavailable, thus barring the right to supervisory relief. *See* Robert J. Martineau & Richard R. Malmgren, *Wisconsin Appellate Practice* 202 (1978).

The court of appeals has not formally stated a policy on this issue. The court's orders—both those denying and those granting supervisory relief—reflect a reluctance, however, to deny a petition for supervisory relief when the only basis for denial would be the existence of an alternative remedy by leave to appeal. If all the other requirements for supervisory relief are present, the court will probably grant the relief. On the other hand, if there is some doubt about the other factors, the court might cite the presence of an alternative remedy as additional support for denying a petition for supervisory relief.

The existence of a right to appeal (as opposed to a petition for leave to appeal) does not preclude the court of appeals from exercising its supervisory authority if an appeal would "come too late for effective redress." *State ex rel. Bohren v. Circuit Ct. (In the Int. of Tiffany W.)*, 192 Wis. 2d 407, 425, 532 N.W.2d 135 (Ct. App. 1995); *see also State ex rel. Godfrey & Kahn, S.C. v. Circuit Ct.*, 2012 WI App 120, ¶ 53, 344 Wis. 2d 610, 823 N.W.2d 816 (concluding that appeal was inadequate remedy when petitioner obtained stay of entry of final judgment pending disposition of petition for supervisory relief).

The remedy for seeking relief from decisions or orders of a judge in a John Doe investigation is by supervisory writ. *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 79, 363 Wis. 2d 1, 866 N.W.2d 165, *clarified on other grounds on reconsideration sub nom. State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49. A party cannot take a direct appeal in such cases because decisions and orders issued by a John Doe judge do not emanate from a circuit court or court of record. *Id.*

A victims' rights constitutional amendment, commonly known as Marsy's Law, included a provision that victims "may" obtain review of all adverse decisions concerning their rights by filing petitions for supervisory relief in the Wisconsin Supreme Court and Court of Appeals. Wis. Const. art. I, § 9m(4)(b) (amended 2020).

Comment. Although the appellate courts have yet to interpret this provision, it appears merely to make explicit a potential remedy by supervisory relief that was already available to any person adversely affected by a court decision. It does not purport to exempt victims from meeting the long-standing requirements for obtaining supervisory relief discussed *supra*, except that it might preclude denial of supervisory relief on the ground that alternative remedies are available.

III. Procedure for Review by Supervisory Writ [§ 10.3]

The procedure for obtaining supervisory relief in the court of appeals is similar to that for appealing a nonfinal order. *See supra* §§ 9.7–.11. A petition is filed with the court, stating the issues, facts, relief requested, and reasons the court should grant relief. The petition and supporting memorandum may not exceed 35 pages if a monospaced font or handwriting is used or 8,000 words if a proportional serif font is used. Wis. Stat. § 809.51(1); *see also supra* §§ 9.8–.9; *infra* app. E. The petition, along with the statutory filing fee, must be filed with the clerk of the court of appeals in Madison. Wis. Stat. § 809.25(2). The petition must be served on all parties. Even if the petition is electronically filed (e-filed), paper copies nevertheless must be served by traditional means. Wis. Stat. § 809.51(1); *see also* Wis. Stat. § 809.51 cmt.—2021 (noting that traditional service is required because a petition to seek supervisory relief initiates a new proceeding, separate from any underlying pending case).

The title "Petition for Supervisory Writ" is a misnomer because the court of appeals never actually issues a writ. Rather, the court grants or denies the petition; if it grants the petition, its order directs that the circuit court or other body take such action as is consistent with the order granting the petition. Wis. Stat. § 809.51(3).

Some confusion also surrounds the caption of these cases. A petition for a supervisory writ initiates a new proceeding, in which the circuit court or other body, the judge, and all other parties in the circuit court action or proceeding are respondents that should be named in the caption. *See infra* app. E.

As with a petition for leave to appeal, a petition for a supervisory writ must contain an adequate statement of facts because the court of appeals will have no record. The petition must provide all the essential information: the parties, the nature of the controversy, how the circuit court erred, and why the court of appeals should step in. All relevant documents should be attached as exhibits, especially any orders or decisions that reveal the circuit court's reasoning.

After setting forth the facts and issues, the petition must show why the appellate court should grant relief. Although not required by the rules of appellate procedure, this analysis should address the criteria for supervisory relief discussed in section 10.2, *supra*. The petitioner should show that there is a clear legal right to the relief requested, that the circuit court is acting contrary to a plain duty, that the petitioner will be irreparably harmed if relief is not granted, and that no alternative remedy is available.

Although there is no specific time prescribed for filing, the petition for supervisory relief should be filed promptly. *Naseer v. Miller (In re John Doe Petition)*, 2010 WI App 142, ¶ 4, 329 Wis. 2d 724, 793 N.W.2d 209. The more time that elapses after the action complained of, the less likely the court will be to hear the claim. *In re Petition of Pierce-Arrow Motor Car Co.*, 143 Wis. 282, 285, 127 N.W. 998 (1910). For example, a petition for supervisory relief was denied as untimely when the petitioner waited almost nine months before seeking relief. *See State ex rel. Nowak v. Waukesha Cnty. Cir. Ct.*, 169 Wis. 2d 395, 397–98, 485 N.W.2d 419 (Ct. App. 1992).

Based on the petition and an analysis by the court's staff counsel, the presiding judge decides to either deny the petition ex parte or order a response. Wis. Stat. § 809.51(2). An attorney contemplating filing a petition for supervisory writ should recognize that this procedure is designed to facilitate a speedy denial of the majority of such petitions. If ordered, the response and any supporting memorandum may not exceed 35 pages if a monospaced font or handwriting is used or 8,000 words if a proportional serif font is used. *Id*.

Occasionally, the court also orders oral argument on its own motion. Apparently to discourage the use of supervisory writs for harassment purposes, Wis. Stat. § 809.51(2) allows a respondent to merely file a letter stating that no response will be filed, but that the petition is not thereby admitted. This is unfortunate because a response is usually ordered to get the other side of the story and to fill factual voids in the petition. By no means does the ordering of a response mean that the court is leaning toward granting the petition. If ordered, the response must be filed within 14 days after service of the court's order and is subject to the same page and word limits as the petition. Wis. Stat. § 809.51(2).

IV. Temporary Relief Pending Petition for Supervisory Writ [§ 10.4]

The filing of a petition for supervisory relief does not stay further action in the underlying case. However, Wis. Stat. § 809.52 provides that the court may grant temporary relief if a request is made in the petition. This is the same rule that covers requests for temporary relief in petitions for leave to appeal, and it is discussed in section 9.12, *supra*.

Supplement Chapter 11
Briefing

Book section supplemented: 11.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

11.1 Scope

Page 2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023; and all references to Wisconsin Supreme Court Rules (SCR) are current through supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 11
Briefing

I. Scope
[§ 11.1]

Written arguments on the merits of an appeal are made to an appellate court in briefs. Wis. Stat. § 809.19 outlines the briefing requirements concerning deadlines, contents, form, number, and length. This chapter discusses those requirements as they apply to briefs filed by appellants and respondents, as well as to briefs filed by other parties and participants, such as cross-appellants and amici curiae. Uniform requirements that apply to all appellate briefs are covered separately. This chapter also discusses motions to extend briefing deadlines and page limits. Finally, there is a general discussion of effective brief writing. [1]

Note. The procedures for traditional (paper) filing and electronic filing, and who must file in which manner, are described in chapter 18, *infra*.

The Appellate Practice Section of the State Bar of Wisconsin has developed various resources that may assist attorneys and self-represented litigants with preparing and formatting briefs. For example, useful checklists concerning the basics of appellate briefing can be accessed on the Wisconsin Court System's website, at *Clerk of the Supreme Court and Court of Appeals*, https://www.wicourts.gov/courts/offices/clerk.htm (follow "Appellate practice checklist outline" or "Appellate brief filing checklist" hyperlinks under "Appellate eFiling") (last updated Oct. 21, 2021). A web application (the Brief Assistant, https://www.briefassistant.com/home) is also available. *See* Colleen D. Ball, *Hate Formatting Appellate Briefs? There's an App for That*, InsideTrack (Sept. 5, 2018), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=10&Issue=15&ArticleID=26553.

Questions about briefing procedure can be posed to the office of the clerk of the appellate courts. Addresses and telephone numbers for the courts are included in appendix A, *infra*.

II. General Format Requirements—Wis. Stat. § 809.19(8)(b) [§ 11.2]

The format of all briefs and appendices filed in the appellate courts must conform to the specifications in Wis. Stat. § 809.19(8)(b). These require, first, that the briefs be created by a process that produces a clear, black image on a white background. Briefs must be produced using a monospaced font, handwriting, or a proportional serif font. Carbon copies cannot be filed. Wis. Stat. § 809.19(8)(b)1.

The next requirement for appellate briefs is that they must be formatted to fit on 8.5- by 11-inch paper; formatting for legal-size paper is not permitted. Wis. Stat. § 809.19(8)(b)2.

Paper copies of documents such as briefs are no longer filed in the court of appeals except in a few limited circumstances, mainly in the case of self-represented filers. All parties represented by counsel must e-file but must also serve paper copies on paper parties, i.e., parties who do not e-file. Wis. Stat. § 809.19(8)(a)1.; *see also* Wis. Stat. § 809.01(25) (defining *paper party*). Paper parties, such as self-represented litigants, must file one copy by traditional means in the appellate court and must serve by traditional means any other paper parties. Wis. Stat. § 809.19(8)(a)2.; *see also* Wis. Stat. § 809.01(31) (defining *traditional methods* as "those methods of filing and serving documents, other than electronic filing, provided under statutes and local rules"). The general procedures for e-filing and paper filing are set forth in sections 18.3 and 18.4, *infra*.

All briefs must have margins of a minimum of 1.25 inches on the right and left sides and a minimum of 1 inch on the top and bottom. Wis. Stat. § 809.19(8)(b)3.e. Either monospaced or proportional serif fonts may be employed. Monospaced fonts must be 10 characters per inch, double-spaced. Wis. Stat. § 809.19(8)(b)3.b. Proportional serif fonts must be no smaller than 13-point body text (or 11-point text for block quotes and for footnotes). Wis. Stat. § 809.19(8)(b)3.c. There are limitations on the use of italics and bold and specifications for line spacing. *Id*.

In addition, the rules now specify that legible, noncursive handwriting may be used for the brief, except that a cursive signature is permitted. Wis. Stat. § 809.19(8)(b)3.d. Pages of paper briefs must be secured together at the top left corner. Wis. Stat. § 809.19(8)(b)4.

All briefs must be paginated, centered in the bottom margin, beginning with the number "1" on the cover. Wis. Stat. § 809.19(8)(bm).

Counsel must submit with the brief and appendix a certification that the document meets the applicable form and length requirements. Wis. Stat. § 809.19(8g)(a) (briefs), (b) (appendices). The form of the certifications is set forth in Wis. Stat. § 809.19(8g)(a) and (b). The certifications may be separate or combined in a single document. Wis. Stat. § 809.19(8g)(c).

III. Appellant's Brief and Appendix—Wis. Stat. § 809.19 [§ 11.3]

A. Time [§ 11.4]

The appellant's brief must be filed with the clerk of the court of appeals in Madison within 40 days after the filing of the record. Wis. Stat. § 809.19(1). The clerk of the court of appeals will give all parties written notice of the filing of the record. Wis. Stat. § 809.15(4m). The 40-day period is triggered, however, by the actual filing of the record, not by receipt of the notice of filing. In cases in which the clerk of the circuit court files portions of the record, such as exhibits, by traditional methods, the date on which the record is "filed" for the purpose of triggering the briefing period is the date on which the e-filing took place. Wis. Stat. § 809.15(4m). Motions to enlarge the time for filing briefs are discussed in section 11.32, *infra*. See Wis. Stat. § 809.107(6) for special briefing rules in cases involving the termination of parental rights.

B. Length [§ 11.5]

The appellant's brief cannot exceed 50 pages if a monospaced font or handwriting is used or 11,000 words if a proportional serif font is used. Wis. Stat. § 809.19(8)(c)1.

The length limitation applies to the statement of the case, the argument, and the conclusion. *Id*. Therefore, the covers, tables of contents and authorities, statement of the issues presented, statement on oral argument and publication, and appendix are not subject to the length limitation.

Note. The appendix is now a separate document and paginated separately. *See infra* § 11.18.

Because of the overwhelming amount of material appellate judges and court personnel must read, the page limits for briefs are strictly enforced. The court of appeals will not review issues incorporated in an appellate brief by reference to circuit court briefs or the appendix, particularly if incorporating those other documents by reference would allow a party to circumvent the page limits. *See State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994). Extensions are rarely granted and, without an extension, a brief exceeding the page limitation will not be accepted for filing. *See infra* § 11.32.

C. Number [§ 11.6]

The former rules requiring the filing of multiple copies have been eliminated as of July 1, 2021. Only one copy is required, whether the filing is electronic or paper. Wis. Stat. § 809.19(8)(a)1., 2. The filing also accomplishes service on all other parties except paper parties, who must be served with one copy by traditional means. *Id*.

D. Cover [§ 11.7]

The appellant's brief must have a white front cover. The cover must identify the court, the case caption and number, the judge and court appealed from, the title of the document (e.g., appellant's brief), and the name and address of filing counsel, if any. Unless precluded by confidentiality (*see infra* § 11.17), the full name of each party must be included, as well as designations of each party's status in the circuit and appellate courts (e.g., plaintiff-appellant). In the supreme court, "petitioner" must be added to the designation of the petitioner, while the respondent's designation remains the same. Wis. Stat. § 809.19(9); *see also infra* app. E (sample cover).

Any paper filed with a court must contain the attorney's State Bar number. Wis. Stat. § 802.05(1). The attorney's State Bar number is appropriately placed both on the front cover (under the attorney's name), and at the end of the brief (after the attorney's signature).

E. Contents [§ 11.8]

1. In General [§ 11.9]

The elements of an appellant's brief, prescribed by Wis. Stat. § 809.19(1), are outlined in sections 11.10–.18, *infra*.

2. Tables [§ 11.10]

Wis. Stat. § 809.19(1)(a) requires that a brief contain "a table of contents with page references of the various portions of the brief, including headings of each section of the argument, and a table of cases arranged alphabetically, statutes and other authorities cited with reference to the pages of the brief on which they are cited."

Most attorneys view compliance with this rule as a tedious formality. A more constructive way to view the rule's requirements, particularly the structure of the table of contents, is as an opportunity to make a good first impression on the reader.

Appellate judges read a large number of briefs, and they appreciate anything that helps them to digest or understand what they read. A table of contents with informative argument headings, identical to the one-sentence summaries required as headings for each argument in the body of the brief, helps the court to quickly grasp the nature of the case. A good table of contents also helps judges as they refer back and forth between briefs. Appellate judges *do* use tables of contents.

The same is true of the table of cases, statutes, and other authorities (e.g., treatises or law review articles). This table is particularly helpful when the court wants to see whether the respondent says anything about an authority cited in the appellant's brief. An accurate table of cases saves time that would otherwise be spent searching the brief for citations.

No court rules dictate the form of the table of authorities. Some attorneys group authorities by jurisdiction, with separate tables for Wisconsin cases, federal cases, and cases from other states. Unless numerous cases are cited, however, it is best to have just one table citing all case authority. Given the different citation styles for federal and state statutes, though, separating statutes by

jurisdiction makes sense, with federal citations giving title and section numbers and Wisconsin citations giving only section numbers.

There are also no court rules regarding alphabetizing cases in the table of authorities. Consequently, attorneys should use common sense, simplifying and avoiding duplication. Although one authority states that cases should be indexed under both primary names (e.g., "*Smith v. Jones*" and "*Jones, Smith v.*"), Marjorie E. Skillin, *Words into Type* 78 (1974), this seems unnecessary and makes constructing the table of cases unduly burdensome. A more practical approach is to alphabetize based on the first party's name only. Case names beginning with phrases like "In re" should be alphabetized under the name that follows this introductory phrase. *Id*. For example, "*In re Ryder*" would be alphabetized under "R," not "I." Corporate names that begin with initials are alphabetized under the first initial. Thus, "*A.O. Smith, Inc. v. Jones*" would be alphabetized under "A."

3. Issues [§ 11.11]

Wis. Stat. § 809.19(1)(b) states that the appellant's brief must contain "[a] statement of the issues presented for review and how the trial court decided them." This section is often a source of difficulty because it requires the argument headings referred to in the table of contents to be recast as issues. This can result in awkward language and create difficult questions of characterization. *See* George R. Currie, *Some Aspects of Appellate Practice Before the Wisconsin Supreme Court*, 1955 Wis. L. Rev. 554, 555 [hereinafter Currie, *Some Aspects*].

For example, an issue might be stated, "Did the circuit court err by granting summary judgment?" Not only is this characterization too broad, but it also makes it impossible to accurately summarize the circuit court's decision. The circuit court did not decide whether it erred; it decided whether summary judgment was appropriate. A much better statement of the issue would be, "Were material facts in dispute, thus requiring denial of the motion for summary judgment?" To this, the following response could be given: "Answered by the circuit court in the negative."

This question-and-answer format for stating the issue and the circuit court's decision is commonly used. The form is merely time honored, but the requirement of stating the issue and the circuit court's decision in isolation is yet another indication of the appellate courts' recognition of the central role of the circuit court and the deference paid to it on appeal.

The rules of appellate procedure do not require framing the issue as a question allowing a positive, negative, or "did not consider" response. If the issue and the circuit court's decision can be presented in another fashion, an attorney may do so. The goal is to pinpoint the real issue, avoid awkward language, and state the issue in no more than a few sentences at most.

While the parties may frame the issues they choose, the court of appeals has power to review and decide issues sua sponte. If the court sees a dispositive issue not raised and addressed by the parties, however, the better course is to order additional briefing rather than deciding the issue without party input. *Oddsen v. Henry*, 2016 WI App 30, ¶ 42, 368 Wis. 2d 318, 878 N.W.2d 720.

4. Statement on Oral Argument and Publication [§ 11.12]

Wis. Stat. § 809.19(1)(c) states that the appellant's brief must contain "[a] statement with reasons as to whether oral argument is necessary and a statement as to whether the opinion should be published and, if so, the reasons therefor." This rule originated when the court was reorganized in 1978. When the rule became effective, it seemed as if all appellants thought their cases should be orally argued and published, while all respondents opposed that position. Over the years, this parochialism has subsided as attorneys have come to recognize that the parties' recommendations have little to do with whether an appellate court grants oral argument or orders publication.

The parties' recommendations do, however, provide the court with two more pieces of information about the importance or difficulty of the case and the issues it presents. The recommendations also tell the court something about the attorneys in the case. An attorney who always recommends oral argument or publication in cases in which they are unwarranted may lose credibility with the court.

The statement on oral argument or publication should reflect the statutory criteria set forth in Wis. Stat. §§ 809.22 and 809.23. These criteria are discussed in detail in section 12.2 and chapter 17, *infra*. The statements are generally very brief, consisting of a few sentences about the significance or insignificance of the issues and a recitation of the pertinent statutory criteria.

Failure to request oral argument or publication does not foreclose either possibility.

5. Facts [§ 11.13]

Wis. Stat. § 809.19(1)(d) requires the appellant's brief to contain the following:

> A statement of the case, which must include: a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record.

The statement of the case is the factual setting for the appeal. Although Wis. Stat. § 809.19(1)(d) identifies four elements of the statement, these need not be strictly circumscribed. It is permissible to include all four elements in one section simply titled "Statement of the Case" or "Statement of Facts." It certainly makes sense, however, to start with a description of the nature of the case. Identify the type of action or proceeding; e.g., a will contest, a murder case, an action to specifically enforce a contract. If the nature of the case is described at the outset, the facts that follow will mean more to the court.

The procedural status of the case leading up to appeal and the circuit court's disposition call for a description of every significant occurrence in the circuit court from the filing of the complaint to the entry of the order or judgment that is being appealed. This is a factual recitation and may be considered part of the larger statement of facts. Indeed, attorneys may wish to include the bulk of the procedural description of the case in the statement of facts.

A good statement of a case, fulfilling both the requirement of describing the nature of the case and the disposition in the circuit court, could be as simple as follows:

Statement of the Case

This is an appeal from a judgment entered September 24, 2021, in the Sheboygan County Circuit Court, by Judge John Doe, which refused to grant specific performance of an oral contract to convey real property. The court concluded that the oral agreement did not fall within any of the exceptions to the statute of frauds.

The complete procedural history of the case could then be included in a separate section labeled "Statement of Facts." There seems to be little sense in giving that history before stating the factual context.

The statement of facts is arguably as important as the argument. A well-constructed statement of facts is essential to understanding the case. A poorly constructed statement of facts not only will make the court's task more difficult, but it also may cast an unfavorable light on the arguments raised later in the brief.

Perhaps the best way to adequately state the facts is to present them chronologically. Supplying dates, relate the case from the inception of the controversy through the order or judgment being appealed. Sometimes, however, the significance of a fact might not correspond with the time it was discovered or admitted into evidence. In that event, relate the fact where it fits most logically. Do not feel bound by the order of proof at trial.

Be specific but discriminating. Every case has a wealth of factual information, but a good attorney is able to cut through the trivia and present only the facts of significance. As a corollary, the statement should be as short as possible. An overly long statement of facts may leave a judge too exhausted to pay careful attention to the argument on the issues.

Cite to the record. This is specifically required by Wis. Stat. § 809.19(1)(d). A statement of facts supported by adequate citation to specific pages in the record is a significant time-saver for appellate judges. A statement of facts with inadequate record citations causes more work for the court, is a nuisance and an irritant, and casts doubt on the factual assertions. When citing the record, be sure to follow the pagination supplied by the clerk of circuit court. If, for example, the transcript is designated as document "10," a cite to page 13 of the transcript should read "R.10 at 13." When citing items in an appendix, cite to both the record and the appendix. It is a rule violation to cite only to the appendix. *Casey v. Smith*, 2013 WI App 24, ¶¶ 1–2 & n.1, 346 Wis. 2d 111, 827 N.W.2d 917, *aff'd on other grounds*, 2014 WI 20, 353 Wis. 2d 354, 846 N.W.2d 791.

Assertions of fact not found in the record are prohibited and will not be considered by the court. *Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991). A failure to provide record citations to factual statements is a rule violation that may warrant sanctions against the offending party's attorney. *State v Bergwin*, 2010 WI App 137, ¶ 18, 329 Wis. 2d 737, 793 N.W.2d 72.

Finally, keep the statement factual and do not shade the facts. A section is provided in the brief for argument. Keep the argument there; in the fact section, be scrupulously honest. As a corollary, one writer advises that appellate attorneys grasp their nettles firmly. Frederick Bernays Wiener, *Effective Appellate Advocacy* 39 (Christopher T. Lutz & William Pannill eds., rev. ed., Am. Bar Ass'n 2004). Face the facts adverse to the appeal. Do not let an opponent take the initiative by revealing them for the first time in the respondent's brief.

6. Argument [§ 11.14]

Wis. Stat. § 809.19(1)(e) states that the appellant's brief must contain the following:

> An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.

The argument is the heart of the brief. Here the attorney should marshal the authorities and facts in a reasoned, yet adversarial, manner designed to show how the circuit court erred.

Each issue presented in the argument must be headed by a one-sentence summary. These summaries, which also are used in the table of contents, show the court the arguments on each issue at a glance and provide a context for analysis and a more developed argument later in the brief.

Summaries of the argument are often poorly drafted, run-on sentences that make a poor impression on the court. A good way to avoid tortured, minutia-filled summaries is to keep in mind the ultimate issue in the case and then make it more specific.

Citations in the brief must comply with SCR 80.02. The initial citation to a published Wisconsin appellate court opinion must include, in order, the public domain citation (if it exists), the *Wisconsin Reports* citation, and the *North Western Reporter* citation. Subsequent citations must include at least one of the three above and be internally consistent. Moreover, for cases issued or ordered to be published on or after January 1, 2000, citations to specific portions of the opinion must be by paragraph number, not by page. Citations to specific portions of opinions issued or ordered to be published before January 1, 2000, are by reference to page numbers. The court of appeals has put counsel on notice that SCR 80.02(3) requires pinpoint citation to the specific page or paragraph. *See Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2005 WI App 189, ¶ 8 n.4, 286 Wis. 2d 403, 703 N.W.2d 737, *aff'd on other grounds*, 2006 WI 67, 291 Wis. 2d 259, 715 N.W.2d 620. For suggestions on the citation format for citable unpublished opinions, see section 17.4, *infra*.

In an effort to minimize confusion, the parties must be referred to by name (e.g., Mary), rather than by party status (e.g., petitioner-appellant). Wis. Stat. § 809.19(1)(i). An exemption to this rule is that in cases of a domestic abuse protective order or a harassment injunction in which "petitoner" has been substituted for a name, reference must be made to "petitioner." *Id.* To be consistent, the same rule should be followed in the statement of the case.

The argument should be as complete as possible. Present everything that is needed to decide an issue, and do not incorporate by reference an argument made in a trial brief. Never simply submit the trial brief with minor changes. As reflected by the standards of review outlined in chapter 3, *supra*, the appellate court's focus is entirely different than that of the circuit court. A simple caption change and factual update are not sufficient; the issues must be recast to address the appellate point of view.

The argument under each summary heading should be confined to the issue identified in the heading. An appellate judge may overlook an issue if it is hidden under another topic heading. The judge may also become extremely annoyed if an attorney appears to be throwing in another issue without an adequate presentation or argument. If an attorney expends little effort on an issue, the appellate court is apt to do likewise. Conclusory allegations of error in an appellate brief will be conclusorily dismissed in an appellate opinion. *Butler v. State*, 102 Wis. 364, 365–66, 78 N.W. 590 (1899). Failure to argue a raised issue or cite legal authority for an argument is waiver. *Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990). The court may refuse to consider

an argument that depends on facts when the brief fails to cite to the record allegedly containing those facts. *See Stuart v. Weisflog's Showroom Gallery, Inc.*, 2006 WI App 109, ¶ 36, 293 Wis. 2d 668, 721 N.W.2d 127, *aff'd on other grounds*, 2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762. To assist the court, record citations already provided for facts recited in the statement of the case should be repeated when those facts are repeated in the argument.

Substantial violations of the briefing rules, including failure to cite to authority and to the record, may warrant striking the brief and dismissing the appeal under Wis. Stat. § 809.83(2). *Mogged v. Mogged*, 2000 WI App 39, ¶ 24, 233 Wis. 2d 90, 607 N.W.2d 662 (imposing sanctions against cross-appellant); *see also infra* § 18.11 (penalties for rule violations—Wis. Stat. § 809.83(2)). The absence of a brief caused by an order striking the brief may warrant imposition of costs and fees on the ground that the appeal is frivolous under Wis. Stat. § 809.25(3). *See Puchner v. Hepperla*, 2001 WI App 50, ¶ 5, 241 Wis. 2d 545, 625 N.W.2d 609.

The court will not address amorphous and insufficiently developed arguments. *See Block v. Gomez*, 201 Wis. 2d 795, 811, 549 N.W.2d 783 (Ct. App. 1996). This is particularly true for complex constitutional issues, *see Cemetery Servs., Inc. v. Department of Regul. & Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998), and when the appellant ignores the ground for the circuit court's decision by making a tangential attack that does not undertake to refute the circuit court's reasoning, *see Munger v. Seehafer*, 2016 WI App 89, ¶ 42, 372 Wis. 2d 749, 890 N.W.2d 22. Each section of the argument should be able to stand on its own. An overworked court of appeals will not respond favorably to arguments that incorporate, by reference, extensive arguments set forth elsewhere in the brief, and the court may decline to review issues so raised. *See Calaway v. Brown Cnty.*, 202 Wis. 2d 736, 750–51, 553 N.W.2d 809 (Ct. App. 1996).

While aiming at thoroughness, attorneys should also strive for brevity in their arguments. One way to ensure brevity in the argument section is to carefully choose the issues for appeal and limit the argument to issues that have a realistic basis. A scatter-gun approach confers no advantage over a brief that aims only at the best targets. Indeed, it may work to the arguing party's disadvantage because the court will tend to take all the issues less seriously. Former Chief Justice George Currie once noted that when a judge has considered point after point and found little merit, the judge may tend to view the remaining points with suspicion. Currie, *Some Aspects*, *supra* § 11.11, at 555.

Perhaps the most significant guideline in determining which issues to present on appeal is the standard of review. *See supra* §§ 3.11–.20. For example, reversal is difficult to obtain on a challenge based on insufficiency of the evidence, because the standards of review are heavily weighted in favor of the trier of fact. To determine which issues are most likely to achieve a favorable result, categorize them under their appropriate standards of review.

The appellant's brief should present the appellant's strongest issue first. A judge's interest will be greatest at the outset of the argument. If a weak issue appears first, the judge may get the impression that the entire case is weak.

Just as an attorney whose statement of facts ignores adverse facts opens his or her case to criticism and raises doubts about credibility, *see supra* § 11.13, an attorney whose argument section ignores adverse case law or statutory authority opens his or her case to attack. The appellant's attorney should anticipate the arguments that may be raised on the respondent's behalf and should attempt to distinguish or discredit them. Indeed, there may be an ethical duty to alert the court to directly adverse authority. SCR 20:3.3(a)(2).

Finally, clarity is essential to an effective argument. If an appellate court cannot easily understand an attorney's position, it will most certainly be unwilling to reverse the circuit court. The appellant has the burden of persuasion, and the first step in persuading is to make oneself understood.

A discussion of the points to consider in constructing the argument in a brief could go on ad infinitum. One text has identified no fewer than 14 generally accepted guidelines, including (in addition to such basics as being brief and accurate) avoiding footnotes, making limited use of citations and quotations, and emphasizing authority from the court's jurisdiction. Robert J. Martineau, *Modern Appellate Practice* 193–94 (1983). For further comments about constructing arguments, see section 11.33, *infra*.

7. Conclusion [§ 11.15]

Wis. Stat. § 809.19(1)(f) requires the appellant's brief to contain "[a] short conclusion stating the precise relief sought." In other words, if the appeal is successful, what does the appellant want the court to do? An appellate court has broad authority. It may

reverse, affirm, vacate, or modify, in whole or in part, the judgment or order appealed. The court may also remand, either for partial proceedings or an entire new trial. Wis. Stat. § 808.09. Because the court of appeals is an error-correcting court, it is more common, however, for the court to reverse and remand rather than to reverse and decide issues de novo. *See Trieschmann v. Trieschmann*, 178 Wis. 2d 538, 544, 504 N.W.2d 433 (Ct. App. 1993). The conclusion, usually a paragraph, affords the appellant an opportunity to state precisely the relief that is desired.

The date of the brief and the attorney's signature and State Bar number should immediately follow the conclusion. *See* Wis. Stat. § 802.05(1). Self-represented parties must sign their briefs. "An electronic signature should be written in the format 'Electronically signed by Your Name.' … Handwritten signatures may be applied before the document is scanned and filed." Wis. Ct. Sys., *Appellate eFiling FAQs*, https://www.wicourts.gov/ecourts/efileappellate/faq.htm (last updated Sept. 7, 2021).

If a brief was prepared by a self-represented party with the assistance of an attorney not of record, the brief must contain a statement that "[t]his document was prepared with the assistance of a lawyer." Wis. Stat. § 802.05(2m). The assisting attorney need not be identified by name or State Bar number. The statement of assistance must be adjacent to the self-represented party's signature at the conclusion of the brief and on any other document prepared with the assistance of an attorney. Wis. Stat. § 802.05(2m).

8. Certification [§ 11.16]

All briefs must include a signed certification that the brief and appendix meet the form and length requirements. Wis. Stat. § 809.19(8g). Sanctions have been imposed for filing a false certification. *See, e.g.*, *Werner v. Hendree*, 2009 WI App 103, ¶ 11, 320 Wis. 2d 592, 770 N.W.2d 782 (imposing monetary sanction on counsel whose appendix did not include circuit court's oral decision), *rev'd on other grounds*, 2011 WI 10, 331 Wis. 2d 511, 795 N.W.2d 423. Because of the possibility for damage to the reputation of an attorney who is found to have filed a "false" certification as to the sufficiency of an appendix, the supreme court "suggest[s]" that the court of appeals preliminarily issue an order to show cause why sanctions should not be imposed rather than imposing those sanctions without notice in the final opinion. *State v. Nielsen (In re Sanctions Imposed in State v. Nielsen)*, 2011 WI 94, ¶¶ 32–33, 337 Wis. 2d 302, 805 N.W.2d 353.

9. Confidential References [§ 11.17]

Wis. Stat. § 809.19(1)(g) requires the appellant's brief to refer to "an individual by one or more initials or other appropriate pseudonym or designation rather than by his or her full name when the record is required by law to be confidential," and in cases of domestic abuse protective orders or harassment injunctions, in which the reference must be to "petitioner." Confidential records generally involve minors (e.g., in cases waiving juveniles into adult court or terminating parental rights to children). *See* Wis. Stat. §§ 48.78, 938.78. There should be little difficulty in identifying cases requiring confidentiality because the circuit court ordinarily will have placed initials, rather than names, in the captions. The appendix must also observe confidentiality rules. *See* Wis. Stat. § 809.19(2)(am); *see also infra* § 11.18.

In addition, briefs must protect the privacy of crime victims. *See* Wis. Stat. § 809.86. *Victim* is defined as a "natural person" against whom a crime, other than a homicide, has been committed or is alleged to have been committed. Wis. Stat. § 809.86(3) (also excluding person convicted of or alleged to have committed crime at issue on appeal). Presumably this definition excludes corporations or other business entities as victims. However, a court may, upon good cause, issue a protective order necessary to protect the identity of any victim or other person and may even exclude compliance with Wis. Stat. § 809.86 entirely. *See* Wis. Stat. § 809.86(5). Unless excluded from the rule, the victim must be identified by one or more initials or other appropriate pseudonym or designation. Wis. Stat. § 809.86(4).

In criminal appeals, except no-merit appeals, parties entitled to have and keep a copy of a presentence investigation (PSI) report can refer to the PSI in an appellate brief to the extent that the reference does not reveal confidential information and is relevant. *State ex rel. Off. of State Pub. Defender v. Court of Appeals (In re State v. Buchanan)*, 2013 WI 31, ¶ 44, 346 Wis. 2d 735, 828 N.W.2d 847; *see also* Wis. Stat. § 972.15(4), (4m). Confidentiality must be observed by following Wis. Stat. §§ 809.19(1)(g) and (2) and 809.81(8), requiring references to individuals by one or more initials or other appropriate pseudonym or designation. *Buchanan*, 2013 WI 31, ¶¶ 39–40, 346 Wis. 2d 735. In these cases, relevance should be viewed narrowly, and it may be appropriate to seek the guidance of the appellate court or even file the brief under seal. *Id.* ¶¶ 42–43.

10. Appendix [§ 11.18]

Regarding an appendix, Wis. Stat. § 809.19(2)(a) states as follows:

> *Contents*. The appellant's brief shall be filed with a short appendix containing, at a minimum, the findings or opinion of the circuit court, limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues, and a copy of any unpublished opinion cited under s. 809.23(3) (a) or (b). If the appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix shall also contain the findings of fact and conclusions of law, if any, and final decision of the administrative agency. The appendix shall include a table of contents indicating, for each record item included in the appendix, the title, page of the appendix on which the record item begins, and the circuit court document number. The table of contents shall also contain the citation of any unpublished opinion included in the appendix.

The appendix must observe confidentiality rules set forth in Wis. Stat. § 809.19(2)(am).

> ***Note.*** The appendix is no longer part of the brief. It is a separate document. Wis. Stat. § 809.19(2)(ae), *created by* Wis. Sup. Ct. Order No. 20-07, 2021 WI 37, ___ Wis. 2d ___ (eff. July 1, 2021). As a separate document, it must have a white cover containing identifying information similar to a brief cover, and it is subject to the rules of confidentiality. *See* Wis. Stat. § 809.19(9).

Furthermore, Wis. Stat. § 809.19(8g)(b) requires the appendix to include a signed certification that the appendix complies with Wis. Stat. § 809.19(2)(a) and (am). A specific form for the certification is prescribed. The certification should be the last item in the appendix. See appendix E, *infra*, for a sample appendix certification form. The execution of the certification is not a mere formality. The court of appeals has sanctioned an attorney for filing a "false certification" when the appendix to that attorney's brief failed to include required information. *State v. Bons*, 2007 WI App 124, ¶¶ 20, 23, 25, 301 Wis. 2d 227, 731 N.W.2d 367.

> ***Note.*** The appendix certification can be either included in the appendix itself or combined with the certification of form and length for the brief. Wis. Stat. § 809.19(8g)(c).

The appendix was once a bulky portion of the brief and had to include an abridged record and a narrative abridgement of the transcripts keyed to the pages of the record. It was expensive and time consuming to produce. The requirements were changed to allow for an abbreviated appendix, without abridged testimony. With few exceptions, the contents of an appendix are now largely determined by the parties. Unfortunately, the good intentions of the current rule have severely diminished the usefulness of appendices. Furthermore, many parties fail to comply with the requirements that do remain.

Ideally, the appendix should contain material that a judge would want to consult while reading and comparing the parties' briefs. Do not limit an appendix to the final judgment or order. In almost every case, the first thing an appellate judge wants to see after reading the briefs is the circuit court's written decision or a transcript of the court's oral decision, and Wis. Stat. § 809.19(2)(a) requires inclusion in the appendix of the oral and written rulings or decision showing the circuit court's reasoning. In addition, the appendix should contain any other relevant documents or testimony essential to an understanding of the issues raised. In a summary-judgment case, for example, this could include the pertinent pleadings and affidavits. Because appellate judges often read briefs when away from their offices, attorneys should compile the appendix with an eye to creating a mini-record.

Because of its special interest to the reviewing court, the circuit court's reasoning (whether it be an oral decision in a transcript excerpt, a memorandum decision, findings and conclusions, or a combination of any of these) is a good choice for the first item to include in the appendix. Thereafter, the attorney must exercise discretion to determine which other documents should be included in the appendix. A good way to make this determination is to look to the circuit court's reasoning; include those documents the circuit court used to reach its decision.

The appendix must include a table of contents. The table should give the title of each item included in the appendix, along with the page of the appendix on which the record item begins and the circuit court docket number. The table should clearly describe the appendix entries. For example, it is more useful to describe an entry as "Deposition of Dr. X, May 4, 2021" than as "Plaintiff's Exhibit B." The table must also provide citations for any unpublished opinions included in the index. Wis. Stat. § 809.19(2)(a).

There is no page limit on appendices. The pages of the appendix are numbered beginning with "1" on the cover. When citing to the appendix in a brief, the usual form is "A-App ___" for the appellant's appendix and "R-App ___" for the respondent's appendix.

The provisions governing a respondent's supplemental appendix (and certification) are set forth in Wis. Stat. § 809.19(3)(b) and (6)(f). *See infra* §§ 11.21, 11.25.

IV. Respondent's Brief—Wis. Stat. § 809.19(3) [§ 11.19]

A. Time [§ 11.20]

The respondent's brief must be filed with the clerk of the court of appeals in Madison within the later of 30 days after service of the appellant's brief (extended by an additional 3 days if the appellant's brief was served by mail), 30 days after the date on which the appellant's brief is filed, or 30 days after the filing of the record in the court of appeals. Wis. Stat. § 809.19(3)(a)1. The date of filing will be in the e-filing system available to all e-filers, while the court will provide notice of filing to paper filers. *See* Wis. Stat. § 809.19(3)(a) cmt.—2021. Failure to timely file the respondent's brief may result in summary reversal or a monetary penalty. Wis. Stat. § 809.83(2). A failure to file tacitly concedes circuit court error. *See State ex rel. Blackdeer v. Levis Twp.*, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993) (quoting *State v. R.R.R. (In re Paternity of N.L.M.)*, 166 Wis. 2d 306, 311, 479 N.W.2d 237 (Ct. App. 1991)). The court ordinarily will grant summary reversal for failure to file a respondent's brief, but it may issue a full opinion on the merits if the case presents issues of substantial and continuing public interest that are likely to evade review. *N.L.M.*, 166 Wis. 2d at 311. See Wis. Stat. § 809.107(6) for special briefing rules in termination-of-parental-rights cases.

Attorneys preparing respondents' briefs must file them electronically. Self-represented litigants may file electronic copies, but need not do so. Wis. Stat. § 809.801(3)(a), (b). The rules for e-filing are set forth at section 18.3, *infra*.

A person designated as a respondent need not file a brief if, within the time limits for filing a respondent's brief, that person files a statement with the court that it will not be filing a brief because its interests are not affected by the issues raised in the appellant's brief or because its interests are adequately represented in another respondent's brief. Wis. Stat. § 809.19(3)(a)3.

B. Length, Number, Appendix, and Cover [§ 11.21]

The requirements for page length and number of copies for the respondent's brief are identical to those for the appellant's brief. *See* Wis. Stat. § 809.19(8)(c)1; *see also supra* §§ 11.5, 11.6. The contents of the respondent's brief are also identical to those listed in Wis. Stat. § 809.19(1) for the appellant's brief, *see also supra* §§ 11.8–.18, except that the respondent need not include a statement of issues or a statement of the case. Wis. Stat. § 809.19(3)(a)2. These elements may be included, but should be excluded if the respondent agrees with the appellant's version. Too frequently, the respondent merely repeats what the appellant has adequately stated. Unless there is a significant disagreement, it is often better to simply note the points of disagreement. Not only does this save time, but it also provides the respondent with additional pages in the brief to devote to legal arguments.

The respondent need not file an appendix. If a supplemental appendix is filed, it must contain a table of contents and a certification similar to that in an appellant's appendix. Wis. Stat. § 809.19(3)(b); *see supra* § 11.18. The cover requirements are the same as for the appellant. Wis. Stat. § 809.19(9).

C. Purpose of Respondent's Brief [§ 11.22]

Although most of the discussion in section 11.14, *supra*, about the arguments in the appellant's brief applies equally to the arguments in the respondent's brief, a few words should be said about the emphasis of the respondent's brief.

By definition, a respondent's brief responds to the appellant's brief. Most authorities agree that the respondent's brief should therefore deal with the issues in the same order they are presented in the appellant's brief. If, for some reason, the appellant has completely mischaracterized the case, the respondent's brief should make this clear before going off and talking about the "real" case. Failure to respond to arguments raised by the appellant amounts to a confession that they are sound. *Hoffman v. Economy Preferred Ins. Co.*, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590. This applies to criminal, as well as civil, cases. *See, e.g.*,

State v. Davidson, 222 Wis. 2d 233, 253–54, 589 N.W.2d 38 (Ct. App. 1998), *rev'd on other grounds*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606.

The respondent cannot raise issues that would require reversing or modifying the judgment or order being appealed unless a cross-appeal is taken. *See supra* § 8.3. The only manner in which the respondent's brief should be nonresponsive to the direct arguments in the appellant's brief is that the respondent may seek correction of circuit court errors that if corrected would support the appealed order or judgment. *See State v. Alles*, 106 Wis. 2d 368, 392–94, 316 N.W.2d 378 (1982).

The respondent's objective is to secure an affirmance of the result in the circuit court. Consistent with this, it has even been suggested that a respondent's brief could be written before receiving the appellant's brief and then revised as necessary. George R. Currie & Nathan S. Heffernan, *Wisconsin Appellate Practice Procedure* 26 (1975).

V. Reply Brief—Wis. Stat. § 809.19(4) [§ 11.23]

Within the later of 15 days after service of the respondent's brief (extended by an additional 3 days if the appellant's brief was served by mail) or 15 days after the date on which the respondent's brief is filed, the appellant must file either a reply brief or a statement that no reply brief will be filed. Wis. Stat. § 809.19(4). The reply brief cannot be longer than 13 pages if a monspaced font or handwriting is used or 3,000 words if a proportional serif font is used. Wis. Stat. § 809.19(8)(c)2. It must have a white cover conforming to Wis. Stat. § 809.19(9). The rules do not provide for an appendix in a reply brief, except that if the reply brief cites an unpublished opinion, a copy of the opinion must be provided in an appendix to the brief. Wis. Stat. § 809.19(4)(b). The reply brief must include an argument with record references and a conclusion.

Attorneys preparing reply briefs must also file them electronically. Self-represented litigants may file electronic copies, but need not do so. Wis. Stat. § 809.801(3)(a), (b). The rules for e-filing are set forth at section 18.3, *infra*.

The purpose of a reply brief is to respond to any arguments raised in the respondent's brief that were not adequately addressed in the appellant's brief-in-chief. In some cases, a reply brief will be unnecessary if the appellant has anticipated the respondent's arguments in the brief-in-chief. A reply brief is not a forum for the appellant to merely restate arguments already made. A reply brief should not be filed for the sole purpose of getting in the last word and restating the appellant's strongest arguments. Note, however, that the court of appeals has stated that it is a rare case in which it is acceptable or wise, in lieu of filing a reply brief, to file merely a letter stating that the appellant stands on the arguments already made. *Cottonwood Fin., LTD v Estes*, 2010 WI App 75, ¶ 26, 325 Wis. 2d 749, 784 N.W.2d 726, *vacated and remanded on other grounds* (Wis. Oct. 25, 2011) (directing court of appeals to reconsider underlying arbitration agreement issues in case in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)); *see also Apple Hill Farms Dev., LLP v. Price*, 2012 WI App 69, ¶ 14, 342 Wis. 2d 162, 816 N.W.2d 914 (holding that appellant who failed to file reply brief conceded to argument made in respondent's brief when appellant relied entirely on foreign case law while respondent's brief relied on Wisconsin law).

A proposition asserted by the respondent and not disputed in an appellant's reply brief is taken as admitted. *See Management Comput. Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 196 Wis. 2d 578, 603, 539 N.W.2d 111 (Ct. App. 1995), *aff'd in part*, *rev'd in part*, 206 Wis. 2d 158, 557 N.W.2d 67 (1996). Thus, a reply brief must sometimes be filed even if the appellant believes that the initial brief more than adequately states the appellant's case on appeal.

It is generally accepted that a reply brief cannot raise new issues. *Schaeffer v. Personnel Comm'n*, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). This is reasonable because the respondent has no right to file a reply. Ordinarily, an issue is deemed waived if it is not raised in the appellant's brief-in-chief. *Adler v. D & H Indus., Inc.*, 2005 WI App 43, ¶ 18, 279 Wis. 2d 472, 694 N.W.2d 480.

When an issue is raised for the first time in the reply brief, the court of appeals will decline to review it on the ground that the matter was "inadequately briefed." *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶ 34, 296 Wis. 2d 337, 723 N.W.2d 131.

VI. Multiple-Party Briefing [§ 11.24]

In cases with multiple appellants or respondents, there may be multiple briefs. The rules for briefing in consolidated, joint, and multiple-party appeals are set forth in Wis. Stat. § 809.19(5). Most notably, multiple appellants or respondents may file separate briefs or a single joint brief, except that parties represented by the same attorney must file a joint brief. Joint briefs cannot exceed the page or word limit for a single-party brief. Wis. Stat. § 809.19(5)(a)–(b). When multiple appellants' or respondents' briefs are filed, an opposing party may file only one respondent's brief or one reply brief, not separate briefs responding or replying to each appellant's or respondent's brief. Wis. Stat. § 809.19(5)(c). Finally, when multiple briefs are filed, the time for responding or replying is triggered by the last-filed appellant's or respondent's brief. Wis. Stat. § 809.19(5)(d).

VII. Cross-appeal Briefing—Wis. Stat. § 809.19(6) [§ 11.25]

The briefing complications occasioned by cross-appeals are addressed in Wis. Stat. § 809.19(6). The appellant–cross-respondent's initial brief is the same as the appellant's brief in a regular appeal. Wis. Stat. § 809.19(6)(a); *see also supra* §§ 11.3–.18. A respondent who is also a cross-appellant must, however, file a combined brief subject to the filing deadline ordinarily applied to respondents' briefs. *See supra* § 11.20. The respondent–cross-appellant's brief is titled "Combined Brief of Respondent and Cross-Appellant." The respondent's portion of the brief must comply with the ordinary provisions for a respondent's brief, *see supra* § 11.21, while the cross-appellant's portion must comply with the ordinary provisions for an appellant's brief, *see supra* §§ 11.8–.18, except that a statement on oral argument and publication and a statement of the case need not be included. Only the conclusion of the cross-appellant's portion of the combined brief must be signed. Wis. Stat. § 809.19(6)(b)2.

A respondent-cross-appellant's brief must include an appendix conforming to the rules for an appellant's brief, *see supra* § 11.18, except that the appendix need not include materials already contained in the appellant's appendix. Wis. Stat. § 809.19(6)(f).

The appellant–cross-respondent must file a brief titled "Combined Brief of Appellant and Cross-Respondent" within the ordinary time for filing a respondent's brief. Wis. Stat. § 809.19(6)(c)1.b.; *see also supra* § 11.20. The appellant's portion must comply with the requirements for a reply brief, *see supra* § 11.23, while the cross-respondent's portion must comply with the requirements for a respondent's brief, *see supra* § 11.21, except that a statement on oral argument and publication need not be included, and only the cross-respondent's conclusion need be signed.

The respondent-cross-appellant's reply brief must conform to the requirements for a regular reply brief under Wis. Stat. § 809.19(4). Wis. Stat. § 809.19(6)(d), (9); *see supra* § 11.23.

It is important to recognize that each portion of a combined brief must comply with the length requirements for that portion. For example, a respondent-cross-appellant cannot borrow words or pages from a short cross-appellant's brief to extend the length of the combined respondent's brief.

VIII. Amicus Curiae Briefing—Wis. Stat. § 809.19(7) [§ 11.26]

A. In General [§ 11.27]

The method of obtaining permission to participate in a case as an amicus curiae is described in section 6.13, *supra*. The amicus brief cannot exceed 13 pages if a monospaced font or handwriting is used or 3,000 words if a proportional serif font is used, Wis. Stat. § 809.19(8)(c)3. The short length is undoubtedly because amicus briefs usually are concerned with only one issue and do not require a factual recitation. Amicus briefs are subject to the rules for electronic filing described at section 18.3, *infra*.

An amicus brief must be filed within the time set by the court in the order granting permission to file the brief, Wis. Stat. § 809.19(7)(c), except when the brief is filed in support of or in opposition to a petition for review or petition for original action in the supreme court, in which case the brief must be filed at the same time as the motion requesting permission to file. Wis. Stat. § 809.19(7)(b). If an unpublished opinion is cited in the brief, a copy must be included in an appendix. *Id.*; Wis. Stat. § 809.19(7)(c).

An amicus curiae typically represents a clearly defined point of view, and the court expects that point of view to come through in the brief. Cases in which amicus participation is most likely to be granted are those with underlying policy issues. In such cases, the court is less interested in a dispassionate review of the applicable law than it is in an interpretation that frankly represents the interests of the amicus, albeit in a temperate manner.

For a discussion of what the court of appeals expects in an amicus brief, see Neal Nettesheim & Clare Ryan, *Friend of the Court Briefs: What the Curiae Wants in an Amicus*, Wis. Law., May 2007, at 10.

The amicus should always remember that its views are accepted, or even solicited, on issues larger than those of the immediate case. Therefore, broad analysis of the case is often appropriate. The brief should, however, remain focused on the issues at hand. Indeed, the order granting amicus participation generally specifies a particular issue in the case for the amicus to brief. Other issues should be left to the parties and the court. Moreover, an appellate court is under no obligation to review issues raised only by an amicus. *County of Barron v. LIRC*, 2010 WI App 149, ¶ 30, 330 Wis. 2d 203, 792 N.W.2d 584.

B. Guardian ad Litem Briefs [§ 11.28]

A guardian ad litem appointed in the circuit court must file a brief on appeal unless a statement of reasons for not filing a brief is filed within 20 days after the filing of the appellant's brief. Wis. Stat. § 809.19(6m). If the guardian ad litem is taking a position as an appellant, the guardian ad litem's brief must be filed within 40 days after the filing of the record. *Id*. If the guardian ad litem is taking a position as a respondent, the guardian ad litem's brief must be filed within 30 days after service of the appellant's brief. *Id*. The guardian ad litem's brief cannot exceed the page limits for an appellant's or respondent's brief, Wis. Stat. § 809.19(8)(c)1. Guardian ad litem briefs also must comply with the rules for electronic filing set forth at section 18.3, *infra*. A guardian ad litem brief citing an unpublished opinion must include a copy of the opinion in an appendix. Wis. Stat. § 809.19(6m).

There is an expedited schedule in appeals in which the guardian ad litem is appointed in a termination-of-parental-rights case. *See* Wis. Stat. § 809.107(6)(d). Wis. Stat. § 809.107(6)(b), (c), and (d) also amplify procedures for guardian ad litem briefing and participation in termination-of-parental-rights cases.

IX. Briefs in Expedited Appeals [§ 11.29]

To expedite appeals and reduce the court's backlog, the court of appeals has initiated a program to identify appeals that can be placed on a special fast-track (expedited) calendar. This program is described in detail in sections 15.6–.11, *infra*.

In addition to matters that the court of appeals chooses to include in the expedited appeals program, certain statutes require expedited treatment. *See infra* § 15.5. For example, electronics and information technology manufacturing zone appeals have expedited schedules for requesting transcripts, filing statements on transcript, and filing briefs. *See* Wis. Stat. § 809.104(2)(f).

A central element of the expedited appeal program is an abbreviated briefing schedule and simplified rules governing the content and form of briefs. A typical briefing order limits the appellant's and respondent's briefs each to 15 pages and gives each party 21 days to prepare the brief; the appellant's reply brief is generally limited to 7 pages and must be prepared in 10 days. Page limits and deadlines may vary, depending on the nature of the case.

The simplified briefing style used in the expedited appeal program is also designed to save time. To make the program attractive to attorneys, the court allows briefs to be less formal than briefs filed in full compliance with Wis. Stat. § 809.19. Using the existing briefing requirements in Wis. Stat. § 809.19 as a reference point, the court drafted fast-track briefing rules, a copy of which it attaches to each order setting an appeal for fast-track disposition. *See infra* app. D.

Consistent with the emphasis on substance rather than form, expedited briefs need not have a cover, a table of contents, or a table of cases. The first page of the brief need merely indicate the appellate court, the circuit court and judge whose judgment or order is being appealed, and the caption and docket number of the appeal. Because expedited cases are rarely of sufficient importance to be published or orally argued, statements on oral argument and publication are not required.

The court is primarily interested in the issues, the facts, and an argument. Thus, the statement of the issues, the statement of the case (including a statement of facts), an argument, and a conclusion are retained. These elements are the core of any brief and take on added significance in an expedited appeal brief because the court pledges an expedited disposition. If the expedited appeal brief is inadequate to prepare the court for a speedy disposition, the entire system will falter.

X. Briefing by Self-Represented Parties [§ 11.30]

The purpose of this section is not to explain briefing requirements to parties who choose to proceed pro se (i.e., to represent themselves without an attorney) but simply to describe how the court does, or perhaps should, handle briefs filed by self-represented parties. Another goal of this discussion is to dissuade those who might think a self-represented party has any advantage on appeal.

Self-represented appellants are generally identified when the notice of appeal is docketed. The clerk of the court of appeals then sends the self-represented party a packet of informational materials, which includes a *Guide to Wisconsin Appellate Procedure for the Self-Represented Litigant*, https://www.wicourts.gov/publications/guides/docs/proseappealsguide.pdf (last updated July 1, 2021), and blank forms for everything from notice of appeal, to motion for relief pending appeal, to petition for leave to commence an original action. These materials are intended to aid the self-represented party and save the court from having to conduct an educational campaign in each appeal by such a party.

In all cases involving self-represented litigants, the court begins with the proposition that the rules of appellate procedure are meant to be obeyed. The mere fact that a party proceeds without counsel is not an excuse for rule violations. While leniency may be allowed, neither a circuit court nor an appellate court has a duty to walk self-represented litigants through the procedural requirements or to point to the proper substantive law. *See Waushara Cnty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). A self-represented appellant may be ordered to pay costs and fees if the appeal is found to be frivolous. *See, e.g.*, *Holz v. Busy Bees Contracting, Inc.*, 223 Wis. 2d 598, 608–10, 589 N.W.2d 633 (Ct. App. 1998). Self-represented parties must make a good-faith effort to comply with the rules of appellate procedure, including the briefing requirements in Wis. Stat. § 809.19. What constitutes a good-faith effort will vary from case to case, however. There are several categories of self-represented litigants, and each raises different considerations with respect to rule compliance.

Self-represented litigants commonly miss deadlines and make numerous requests for extensions. Attorneys are familiar with the need for strictly enforced time limits and with the consequences that flow if those limits are overstepped. Inexperienced self-represented litigants are generally entitled, however, to more liberal treatment in the area of deadlines and should be given a second chance. However, *experienced* self-represented litigants, and there are many of them, deserve to be treated as severely as an attorney would be if deadlines are not met. Experienced self-represented litigants should be identified and discouraged from feigning ignorance of the procedural rules.

When an appellate court receives a brief that fails to conform to the rules of appellate procedure and is filed by a self-represented party, the court refers the brief to a staff attorney, who then consults with the clerk of court to determine whether the defects should be excused and the brief accepted for filing. In making this determination, the court looks for evidence in the brief of a good-faith attempt to substantially comply with Wis. Stat. § 809.19. Does the brief show that the litigant was aware of Wis. Stat. § 809.19 and at least attempted to follow its requirements on briefing form? A brief that reflects no attempt to follow the rules will be sent back to the litigant with a copy of Wis. Stat. § 809.19 and instructions to begin again.

Depending on what the court knows about a particular litigant's circumstances, almost any of the briefing requirements may be waived, except the basic requirements that the brief state the issues, provide the facts necessary to understand them, and present an argument on the issues.

Handwritten documents, including briefs, are acceptable so long as they are printed legibly. Cursive writing is prohibited, except for the brief-writer's signature. Wis. Stat. § 809.19(8)(b)3.d.

Briefs themselves cannot be waived. Parties have unsuccessfully attempted to submit their appeals on a letter stating that they seek affirmance or reversal based on the entire record on appeal. Similarly, parties cannot incorporate their trial briefs by reference. Although a trial brief may be used as the basis for the appellate brief, it should be modified and supplemented as necessary to show compliance with Wis. Stat. § 809.19.

An appellate court will dismiss an appeal of a self-represented party for procedural defects if the litigant fails to show good-faith efforts to comply with the rules. The court will always inform a litigant beforehand, however, that failure to comply may result in dismissal or other penalty.

Self-represented parties sometimes have the assistance of a lawyer who does not appear as of record in the matter. This practice is recognized and regulated by Wis. Stat. § 802.05(2m), requiring that any paper filed by a self-represented litigant with the assistance of a non-appearing attorney must contain a statement to that effect. *See supra* § 11.15.

Although the court may make special concessions in certain appeals by self-represented parties, it cannot be said that appellants in such cases have any advantage over appellants who are represented by counsel. Whatever minor procedural deviations are allowed, a self-represented appellant cannot compensate for the lack of legal training and therefore has a greatly reduced likelihood of success on appeal.

XI. Newly Discovered Authorities [§ 11.31]

Every appellate attorney must deal with the questions of whether and how to inform the court about authorities discovered after the briefs have been filed. The answers to these questions depend on several factors, including the importance and nature of the newly discovered authority.

Newly discovered authorities are of two types: those that could have been discovered before filing the briefs, and those that could not have been discovered or were otherwise unavailable (e.g., a court of appeals decision not yet ordered for publication) until after the briefs were filed. The rules specifically authorize a supplemental filing to notify the court of authorities "decided after briefing." Wis. Stat. § 809.19(10). Wisconsin Court of Appeals decisions are considered decided on the date of the order for publication. Accordingly, the rule does not authorize a party to alert the court to decisions that have been recommended, but not yet ordered, for publication.

Comment. This rule is arguably inconsistent, however, with Wis. Stat. § 809.23(3)(b), which now allows citation of unpublished, authored court of appeals decisions. *See infra* § 17.4. Therefore, it would seem permissible to alert the court to newly discovered authority, even if an opinion not ordered for publication, if the unpublished opinion has persuasive value pursuant to Wis. Stat. § 809.23(3)(b).

The briefing rules contemplate that all relevant authority that an attorney chooses to present to the court be presented in the briefs. Any attempt, therefore, to later supplement the briefs with authority that could have been included earlier may be considered a rule violation, and the new material may be stricken pursuant to Wis. Stat. § 809.83(2).

This does not mean, however, that an attorney should not bring overlooked authority to the court's attention. If the authority is crucial, it is obvious that an attempt must be made. Even if the court imposes a sanction, it is unlikely the court could completely ignore pertinent authority. There is no way it could ignore controlling authority.

The procedure for alerting the court to newly discovered authorities is by letter to the clerk of court, which must (1) set forth the citations for the new authorities, (2) identify the page of the brief or portion of the oral argument to which the citations pertain, and (3) briefly discuss the proposition to which the authority pertains. Wis. Stat. § 809.19(10). The adverse party may file a short responding letter, within 11 days after service of the first letter. Wis. Stat. § 809.19(11). As with all documents filed in the court of appeals, one copy is filed whether by e-filing or paper filing. *See infra* §§ 18.3, 18.4.

XII. Extension of Briefing Deadlines and Page Limits [§ 11.32]

Wis. Stat. § 809.82(2) gives an appellate court broad authority to enlarge or reduce any time period prescribed by the rules of appellate procedure, except the time for filing of the notice of appeal in a civil case and the time for filing a motion for reconsideration under Wis. Stat. § 809.24. The court may also waive any requirement under the rules. Thus, any requirement in the briefing process may be changed by the court on its own motion or on motion of the parties supported by good cause. *See infra* ch. 13 (general motion practice). The parties, however, cannot stipulate to extend the time for filing briefs. *See* Wis. Stat. § 809.82 Judicial Council Notes—1978.

Among the most common motions filed in appeals are those to extend the briefing time and the page limits of the brief. To obtain a page extension, the motion must demonstrate that the appeal is extraordinary in significance, number of issues, and factual complexity. Appellate judges read a large number of briefs, and they know it is a rare case indeed that requires more than the 50

pages (or 11,000 words) allowed. An appellate judge is not apt to be impressed when a motion recites that the appeal involved 8 issues, the trial lasted 10 days, and the transcript is 5,000 pages long. It is in cases like this, in fact, that the 50-page limit is perhaps most essential to keep the briefs manageable.

A brief writer should anticipate that judges will appreciate brevity and will be less likely to give their undivided attention to a 40- or 50-page brief than to a 25- or 30-page brief. An attorney who simply pays attention to the basics of good brief writing should not need to write a brief of 50 or more pages. Cull the nonessentials from the statement of facts, delete discussion of unimportant issues, eliminate string citations, and get to the point.

There are good reasons for requesting an extension of the time for filing a brief. The most important point, however, is to move for the extension before the brief is due. A motion filed after the fact is generally less persuasive than one filed in advance of a delinquency notice. The motion must specify the amount of time requested and the reason for the request.

The extremely short briefing times established in some appeals—for example, those dealing with termination of parental rights—can be extended. *See Rhonda R.D. v. Franklin R.D. (In the Int. of Christopher D.)*, 191 Wis. 2d 680, 695, 530 N.W.2d 34 (Ct. App. 1995). In the absence of reasons for an expedited appeal, the court is likely to look favorably upon motions to extend these time periods.

Illness is usually good cause for an extension of time. Substitution of counsel is generally accepted as good cause for extending a briefing deadline. Previously scheduled vacations falling within the briefing period may also be good cause; the court recognizes that attorneys are often booked for months, even years, in advance and that vacations are not easily taken or cancelled.

A more difficult situation, and perhaps the one most often encountered in motions to extend briefing time, results from the attorney's workload. The problem here is that almost every attorney has a heavy workload. Motions for extension based on workload should be well documented and infrequently made. Attorneys who anticipate severe time constraints because of a conflict between appellate briefing dates and other obligations might want to consider asking another attorney to write and file the brief.

XIII. Practice Tips [§ 11.33]

An examination of the many authorities on effective brief writing reveals near unanimity on the essentials of the subject. This is not surprising because the basics of brief writing are simply the basic rules of composition and exposition. The continued publication of "how to" manuals and articles on brief writing does not reflect professional debate over the basic rules but a continuing inability of the bar to recognize and apply them.

Many attorneys seem to feel that simplicity and brevity are out of place in an appellate brief. They write as if they believe the court will only be persuaded by a brief that reads like a law review article, loaded with footnotes and string citations.

Nothing could be further from the truth. Because an appellate court deals almost exclusively with written arguments, and a tremendous volume of written arguments at that, it appreciates briefs that are easy to read. Moreover, if the court cannot understand the facts or arguments, as written on behalf of a particular client, or finds the brief a chore to read, the client is in trouble.

Brevity is probably the most important concept in effective legal writing. Coupling brevity with simplicity promotes clarity and effectiveness. According to legend, Michelangelo was once asked how to carve a statue. "Easy," he said, "start with a piece of marble and remove everything that isn't art." The legal writer must apply the same principle to words, sentences, paragraphs, quotations, lists of authorities, numbers of issues, and, ultimately, the brief itself. Remove every word and syllable that can possibly be deleted. This does not mean that a long word is the wrong word; just be sure it is the right word. When in doubt, use the shorter word. Simplify and clarify.

Write short sentences. They are easier to understand. Use short paragraphs. A paragraph that fills a page immediately suggests to the reader that the person who prepared the brief is a poor writer and that reading the brief is going to be a chore.

Avoid long quotations unless they are absolutely necessary. The eye can handle only so much single-spacing before tiring and losing interest. Paraphrase the bulk of the material.

String citations are uniformly criticized but are still widely used in the mistaken belief that they evidence scholarship. In fact, string citations may have the opposite effect. Judges view string citations skeptically: they wonder whether the attorney has actually read the cases and expects the court to read them. Excess scholarship may hurt the brief writer's case. One or two citations are almost always sufficient.

Always be sure citations are accurate and in proper form. For Wisconsin cases, give both the *Wisconsin Reports* and *North Western Reporter* citations, along with the public domain citation, if it exists. *See* SCR 80.02. (Public domain citations are assigned to cases issued or ordered to be published on or after January 1, 2000.) Cite to the particular page of the reporter, when appropriate, and to the relevant paragraph number for cases with public domain citations. *Id.*; *see supra* § 11.14.

Avoid footnotes; they are the bane of brief writing. Footnotes destroy the continuity of a brief and distract the reader's attention from the text. Case citations should always be given in the body of the brief. The text of a statute is perhaps the only authority that deserves footnoting, but even a statute should be paraphrased and put in the text if possible. Avoid the habit of presenting tangential arguments or distinctions in footnotes. Moreover, addressing an issue in a footnote to a brief not only makes it easy to overlook that issue but also may lead the appellate court to decline to review the issue. *See Aon Risk Servs., Inc. v. Liebenstein*, 2006 WI App 4, ¶ 47, 289 Wis. 2d 127, 710 N.W.2d 175. (*Aon Risk Services* was partially overruled on other grounds but is still citable as persuasive although not controlling authority. *See Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.*, 2011 WI App 162, ¶ 9, 338 Wis. 2d 144, 807 N.W.2d 697.)

Put life into a brief by writing in the active voice. The passive voice can produce dreary recitations. The active voice puts the reader on the spot as a participant, rather than a detached observer.

Accurate spelling and proper punctuation are basic elements of an effective brief. *See, e.g.*, Lawrence Grey, *Writing a Good Appellate Brief*, Case & Comment, Nov.–Dec. 1983, at 44. The brief writer should have someone else check the brief to catch any spelling and punctuation errors.

The sometimes poor quality of published judicial opinions should not lead attorneys to adopt judges' stylistic mistakes. Judges, too, need to be reminded to avoid excessive verbiage, string citations, footnotes, and recitations of unnecessary facts. Furthermore, just because some judges are poor writers does not mean they cannot recognize good legal writing when they see it.

Know the reader. Be sensitive to the judge's problems. This is a pragmatic, not a sympathetic, principle. Recognize that to an appellate judge, the brief is more than just an argument; it is a map of the case. Tell the court what the case is about. Take nothing for granted, and do not rely on the judge's law clerk to do the attorneys' work. As they say, hard cases make bad law. Do not make the case any harder than need be.

To help ensure a logical structure for the brief, outline the points before drafting a brief. Once the brief is written, carefully proofread and edit it, especially if it was dictated.

One of the most difficult tasks for an appellate attorney is to limit the issues on appeal. If the attorney searches hard enough, a number of errors will be found in every court proceeding. Most of these errors are minor and would provide no basis for success on appeal. Consequently, prospective issues should be analyzed with skepticism. Look for harmless error. Identify the standards of review and consider the issues against them. Reject the idea that the number of errors alleged in a brief somehow lends weight to each individual assignment of error; alleging too many errors often creates just the opposite result.

Be honest about the authorities and the record. Not only is there an ethical obligation to do so, but an attorney will tear any thread of credibility if the court catches a brief fudging in any manner. *See State v. Lass*, 194 Wis. 2d 591, 605, 535 N.W.2d 904 (Ct. App. 1995).

It has been said often enough, by various judges, that the ideal brief is so fair and objective that, with generous paraphrasing, it can be used as the basis of the court's opinion. That the brief should be fair and honest there is no doubt. It is then most persuasive. There is plenty of room to be simultaneously fair, objective, and a partisan advocate. There is also no doubt that such a brief makes life easier for a court. The attorney should, however, have reservations about a brief so tame that it passes through the court's digestive system without creating some turmoil. Many times, an appellant must ask an appellate court to do some original thinking.

In a common-law system, the absence of controlling authority is not a fatal defect when a reasoned argument based on law, logic, and equity is presented.

Since they have their own perspective, appellate attorneys may have reservations about taking too much advice from judges, *see* Martineau, *supra* § 11.14, at § 11.16, but it would be a mistake to ignore the opinions of judges about what they like to see in an appellate brief. *See, e.g.*, Shirley S. Abrahamson, *Some Thoughts About Appellate Argument*, Feb. 1979, at 41; William Eich, *Writing the Persuasive Brief*, Wis. Law., Feb. 2003, at 20.

Another excellent authority on appellate brief writing is Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (2d ed. 2003); *see also* Martineau, *supra* § 11.14, ch. 11.

Finally, do not let the foregoing discussion of effective writing obscure the primary purpose of an appeal: to persuade the court to render a favorable decision for the client. In preparing a persuasive brief, there is no substitute for good analytical thought and clean, concise writing to convey that thought to the minds of the judges who will decide the case.

The facts are relatively static, although obviously capable of different adversary interpretations. The cases, statutes, and authorities are also fixed, assuming that the attorney's research methods have led to all the authorities that are germane.

What is never static in this marvelous common-law system of ours is creative thought. But that thought will die an obscure death unless it can be conveyed to the court in a clear and comprehensible fashion.

Supplement Chapter 12
Oral Argument

Book section supplemented: 12.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

12.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 12
Oral Argument

I. Scope
[§ 12.1]

Although still common in the supreme court, oral argument is an endangered species in the court of appeals. It is conceivable that an attorney could practice appellate law for years and not present oral argument unless one of the attorney's cases reached the supreme court. This chapter outlines the criteria the courts use to determine whether to grant oral argument. It also describes some practice tips on effective oral argument. For a good discussion of oral argument generally, see Ruggero J. Aldisert, *Winning on Appeal* pt. IV (2d ed. 2003). [1]

II. Criteria for Oral Argument—Wis. Stat. § 809.22; Location of Argument [§ 12.2]

One of the most controversial and disapproved developments in recent years is the decline of oral argument on appeal. The elimination of most oral argument ultimately flows from the increase in appellate court caseloads and is aimed at relieving the court's burden. Only about one percent of cases before the court of appeals are orally argued. Wis. Ct. of Appeals, *Court of Appeals Annual Report 2020*, https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=391847.

Wis. Stat. § 809.22 sets forth the criteria that both the court of appeals and the supreme court use to determine whether an appeal should be orally argued or decided on the briefs alone. At first glance, the rule appears to favor oral argument by stating that the court may direct that an appeal be decided on briefs only if certain criteria are met. However, the rule provides the court with ample discretion to deny oral argument in all but a few cases.

Wis. Stat. § 809.22(2)(a) effectively stands for the proposition that easy cases need not be orally argued. Wis. Stat. § 809.22(2)(a) covers cases in which the appellant's arguments are contrary to well-recognized and widely accepted principles of law, are prima facie without merit, or concern solely questions of fact under circumstances in which the findings of fact are clearly supported by sufficient evidence.

Wis. Stat. § 809.22(2)(b) covers more difficult cases and is often the basis for denying oral argument. This rule allows disposition without oral argument when the briefs fully develop and meet the issues and when oral argument would be of such marginal value that it does not justify the expense of court time or cost to the litigant. Wis. Stat. § 809.22(2)(b) clearly vests the appellate courts with considerable discretion to grant or deny oral argument.

The courts rarely explain their decisions to grant or deny oral argument. A decision as to oral argument is generally revealed in the notice of submission, which states either that the case will be decided on briefs or that oral argument is scheduled for a given date.

If oral argument is allowed in the court of appeals, the argument is generally held at the court chambers of the district involved. Districts II, III, and IV also have alternative hearing sites in their districts. Oral arguments are sometimes held at these locations.

Wis. Stat. § 752.31(3) provides that an appeal decided by a single court of appeals judge may be heard in the county of origin if the party so requests. However, even if a party files a proper request for hearing in the county of origin, along with the notice of appeal required by Wis. Stat. § 809.41(4), the court of appeals rarely grants such requests. *See infra* § 20.6.

If an appeal or other proceeding reaches the supreme court, the likelihood that oral argument will be granted is greatly increased. The majority of cases the supreme court decides on the merits are orally argued. Given the supreme court's discretion to select cases, the easy case contemplated by Wis. Stat. § 809.22(2)(a) should never reach that court. Moreover, because of the supreme court's emphasis on law development, the cases it accepts generally involve policy considerations, which are particularly appropriate for discussion at oral argument.

Cases argued in the supreme court might not have been argued in the court of appeals. The most likely candidates for oral argument in the court of appeals are cases concerning public issues of general importance or cases raising issues of first impression. Nonetheless, the court of appeals generally considers oral argument an unworthy investment of its time, which is not at all inconsistent with its high-volume, error-correcting function.

Wis. Stat. § 809.22(4) provides that oral arguments may be heard by telephone. This option has been used infrequently, if at all. If oral argument is to have any persuasiveness over and above the briefs, it should be done face to face.

III. Timing Issues [§ 12.3]

The supreme court and the court of appeals usually grant 30 minutes per side for oral argument. Co-appellants or co-respondents usually must share the 30-minute argument period.

The court of appeals' internal operating procedures do not describe the timing procedure for oral argument in that court. In practice, however, a court employee times the argument and informs the parties at regular intervals how much time remains.

The internal operating procedures of the Wisconsin Supreme Court describe the timing procedure for oral argument in that court. *See infra* § 27.25. The petitioner speaks first for 25 minutes. Five minutes are then reserved for rebuttal. A yellow warning light comes on when only five minutes remain. Thus, the yellow light comes on 20 minutes into the petitioner's argument and 25 minutes into the respondent's argument. A red light signals when the time has expired. A seldom-used buzzer stands ready to warn the long-winded, but usually the chief justice interrupts the speaker and terminates the argument if necessary.

The most important point to remember is for the speaker to stop before or as the allotted time expires. The speaker should not make the court stop the argument after the expiration of time. Even if the red light comes on while the speaker is in the middle of answering a question posed by the court, the best policy is to stop immediately and inform the court that the time is up. If the court wishes to hear the rest of the answer, it will say so. If permission to continue is granted, the attorney should not take it as carte blanche for extended discourse but should finish the answer as quickly as possible.

IV. Practice Tips [§ 12.4]

Although the infrequency of oral argument in the court of appeals means that fewer attorneys will be giving oral argument, this does not lessen the significance of oral argument. Indeed, the infrequency of oral argument ensures that it will be granted most often in those cases in which it may have a measurable effect on the decision. Oral arguments are no longer held in easy cases (e.g., cases concerning the sufficiency of the evidence) but are reserved for cases involving matters of public importance, cases in which policy plays an important role, and cases in which change and development in the law are considered.

Oral argument serves a much different function than it did years ago. Whereas formerly briefs supplemented oral argument, now oral argument supplements the briefs.

The former practice in Wisconsin was to use oral argument as an introduction to the appeal. Former Chief Justice Marvin B. Rosenberry, who served on the supreme court between 1916 and 1950, wrote that he did not make a point of reading the briefs before oral argument. *See* Frederick Bernays Wiener, *Effective Appellate Advocacy* 19 (1950). Under those circumstances, it was important to pattern oral argument along the lines of a brief by giving a detailed factual statement, carefully defining the issues, and presenting argument on all of those issues.

Today in Wisconsin, judges on the court of appeals and the justices of the supreme court routinely read the briefs before oral argument. This practice is recognized in the internal operating procedures for both courts. *See infra* §§ 21.18, 27.24. The court of appeals' internal operating procedures also provide that before oral argument, the judges will meet to discuss the case, identify the issues needing further exploration, and plan questions to pose during oral argument. *See infra* § 21.18. It is also common for the court order setting the case for oral argument to specify the issue or issues to be argued.

Thus, today's appellate court is well prepared for oral argument. Appellate counsel must recognize that this has led to a basic shift in the emphasis of oral argument. No longer does oral argument serve as an introduction to the case. A lengthy recitation of facts is not necessary. Oral argument is more issue oriented, and the issues either are limited by the court or should be limited by counsel to those central to the appeal.

Questions and answers have replaced ringing declamations in oral arguments before appellate courts. Skill in public speaking is still essential, but an appellate oral argument is no longer a speech. Because questioning now occupies a central role in oral argument, the structure of the argument should allow for interruptions. It is not uncommon for the questions to begin as soon as counsel utters, "May it please the court." And is it not unknown for the questions to continue unabated for the entire time allotted.

Although an attorney should prepare an opening statement and a closing statement, it is advisable to leave what lies between—the bulk of the argument—as an outline of facts, ideas, arguments, and authorities to raise as the opportunities arise.

This does not mean that lawyers should prepare any less for an oral argument than they would for a speech. The question-and-answer format demands thorough preparation because the court is sure to have a number of specific questions it wants addressed. An ability to answer these questions, more than oratory skills, will impress the court.

A false step during oral argument may lead to disaster. A concession made at oral argument, however, will not serve as a basis for denying relief on appeal, unless the concession is "unequivocal and deliberate." *Johnson v. Kokemoor*, 188 Wis. 2d 202, 226–27, 525 N.W.2d 71 (Ct. App. 1994), *rev'd on other grounds*, 199 Wis. 2d 615, 545 N.W.2d 495 (1996). Moreover, a party cannot raise an issue on appeal at oral argument, even if it was raised in the circuit court, without first raising it in the appellate briefs. *See, e.g.*, *A.O. Smith Corp. v. All State Ins. Cos.*, 222 Wis. 2d 475, 491–93, 588 N.W.2d 285 (Ct. App. 1998).

Do not read a brief to the court. If the material in the brief fully addressed the issues on appeal, it is unlikely that oral argument would have been granted.

Anticipate the questions that the court will have. Focus the argument on areas that are likely to be in dispute. Do not waste time on matters that are well settled.

Because oral argument is usually granted in cases presenting policy issues of broad concern, do not limit the argument to the effects of the specific case on appeal. Be prepared to present criteria for addressing other cases.

Know the facts. Although a detailed factual statement is, for the most part, no longer a standard component of oral argument, the attorney must be able to answer any questions that pertain to the facts. Many attorneys who have taken a case through trial and up on appeal mistakenly think that they know the case too well to undertake an in-depth factual review before oral argument. They then learn to their dismay that in the months between briefing and oral argument they have forgotten much of importance.

Answer the questions. One of the traps of a fixed-format oral argument is that the court pays no attention to the speaker's desired format. When the court asks a question, it wants an immediate answer. It does not want the attorney to respond that he or she will get to it later.

Welcome the court's interruptions. An attorney should be more concerned if the court sits in bored silence than if it expresses a lively interest in the case by interrupting.

On the other hand, there is no doubt that some judicial interruptions are more irritating than others. When dealing with a collegial court, there are bound to be all types of questions. Most will be honest, insightful attempts to better understand the case. A few, however, may be political statements for the benefit of the electorate, and some may be irrelevant absurdities. Nonetheless, counsel should respond to each question as earnestly and respectfully as possible.

Try to avoid being misled by the questions. It is very difficult to gauge the outcome of an appeal by the questions asked at oral argument. Some judges like to play devil's advocate. It may be that the judge who is an attorney's sharpest critic at oral argument will be his or her biggest supporter in the postargument conference.

As in briefing, brevity is essential to effective oral argument. The time limits on oral argument do not allow expansive discourse. But oral argument should not be considered as an exercise in speaking no more than 30 minutes. Just as a 25-page brief is more effective than a 50-page brief in holding the court's attention, a 15- or 20-minute oral argument is better than an argument that continues only because the speaker will not stop until the red light comes on.

Oral argument is essentially an art, not a science. Like all art, what is omitted is frequently as important as what is included. Former Chief Justice Horace Wilkie stated that the most important thing for an oral advocate to know is when to sit down. He also indicated that, by and large, the sooner the attorney sits down, the better. Horace W. Wilkie, *Briefing and Oral Arguments in Supreme Court*, Wis. Bar Bull., Feb. 1970, at 28. If that is true, the oral argument should run the full 30 minutes normally allotted only if the court's questioning extends it that far.

The most obvious place to cut back is the facts. The facts will already be fully presented in the brief, and the court will have read the brief. Thus, the introductory statement should include a concise statement of facts, but no more than is necessary to set the stage

and refresh the court's memory.

Present argument on one issue or, at most, two issues. Do not weaken the presentation by giving an incomplete treatment of a multitude of issues. Narrow the focus to the most significant issues in the case. These are the issues that undoubtedly formed the basis for granting oral argument in the first place. Leave the other issues to the brief. Allow plenty of time for questions; 10–15 minutes would be appropriate. Remember that this is not lost time. For the most part, the questions will concern matters that the attorney would have planned to address in any event.

Do not be afraid to end the argument. Ask the court if there are any more questions. If not, thank the court and sit down. If rebuttal time is available, do not feel obligated to use any or all of it. Use common sense, and keep any rebuttal short.

Regarding the logistics of presenting oral argument, one authority offers some practical suggestions. *See* Robert J. Martineau, *Modern Appellate Practice* 214–16 (1983). Being familiar with the physical surroundings where the argument will be presented and observing another attorney's oral argument can lend self-assurance to an attorney arguing for the first time before an appellate court. For those arguing before the Wisconsin Supreme Court or District IV of the court of appeals, the joint clerk's office located in Madison should be able to provide any needed information. The staff of the other court of appeals districts will provide similar assistance. See appendix A, *infra*, for names and telephone numbers.

Be sure to obtain advance permission from the clerk of court before using any audiovisual aids. On the morning of the argument, check with the clerk to confirm the schedule. Attorneys should be familiar with the members of the reviewing court and where they sit on the bench.

Speak neither down nor up to the judges. Former Chief Justice Nathan S. Heffernan counseled that the proper attitude is one of respectful intellectual equality. *See* Walter L. Harvey, 4 *Wisconsin Practice* § 0.54 (1976). Remember that attorneys at oral argument are not addressing a jury.

Never interrupt opposing counsel's argument. The attorneys should await their turns to correct any misstatements. If a misstatement occurs during rebuttal, it is probably not worth the disruption that will occur if the attorney insists on orally pointing out the matter.

The Wisconsin Court System's website provides live audio access to oral arguments heard by the Wisconsin Supreme Court at https://www.wicourts.gov/opinions/soralarguments.htm (follow "Live streaming audio of oral arguments" hyperlink). The court's oral arguments are also recorded. Parties or interested persons may apply for permission of the court to listen to the audio recordings. Wis. Sup. Ct. Internal Operating Procs. III.D. (June 30, 2021); *see infra* § 27.25. Recordings of oral arguments for all cases heard by the supreme court since September 1997 are also available on the Wisconsin Court System's website, https://www.wicourts.gov/opinions/soralarguments.htm (last updated Sept. 7, 2021).

In summary, the entire procedure for oral argument can be reduced to a simple formula: thoroughly understand the case, both factually and legally, and have the desire to communicate that understanding to the court.

Supplement Chapter 13
Motion Practice—Wis. Stat. § 809.14

Book section supplemented: 13.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

13.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 13
Motion Practice—Wis. Stat. § 809.14

I. Scope
[§ 13.1]

Virtually every requirement of the rules of appellate procedure is subject to alteration by the appellate court on the motion of a party or on the court's own motion. Wis. Stat. § 809.82(2). This chapter considers the basic rules for composing, filing, and serving a motion filed in any proceeding before the court of appeals or supreme court. How a pending motion affects time limits is also considered. [1]

Detailed discussions of particular types of motions are found elsewhere in this book. *See supra* §§ 6.10–.13 (petitions to intervene and for leave to file amicus curiae brief), 7.4 (motion to supplement or correct record), 8.4 (motion to consolidate), 9.12, 10.4 (request for temporary relief pending petition for leave to appeal or petition for supervisory writ), 11.32 (motions to extend briefing deadline on page limits); *see also infra* ch. 14 (motion for relief pending appeal); §§ 15.2 (motion to advance), 15.3 (motion for summary disposition), 16.2 (motion for reconsideration in court of appeals), 18.9 (motion to enlarge time), 18.13 (motion to withdraw as counsel), 19.16 (motion for postconviction or postdisposition relief), 19.17 (motion to modify sentence), 19.18–.21 (motion for release on bail pending appeal), 19.25 (motions under Wis. Stat. § 974.06), 20.7 (motion for three-judge panel), 22.5 (motion for reconsideration in supreme court).

In termination-of-parental-rights appeals in which the appellant seeks an outcome that may require further circuit court hearings and fact-finding, the appellant must file a motion in the court of appeals within 15 days after filing the appeal record (45 days if not represented by counsel), requesting the court of appeals to retain jurisdiction but remand to the circuit court to hear and decide the issue. Wis. Stat. § 809.107(6)(am). If this is not done, the appellant, presumably, is foreclosed from seeking such relief in the court of appeals.

II. Contents of Motion and Response [§ 13.2]

At a minimum, a motion must state the order or relief sought and the grounds on which the motion is based. Wis. Stat. § 809.14(1). It may include a statement as to the position of other parties (e.g., respondent's counsel has been contacted and has no objection to the motion) and may be supported by a memorandum. *Id*.

The most common errors in motion practice are not including sufficient facts to enable the court to understand the motion and failing to provide a sufficient statement of the reasons for the motion. Motions lacking this information will be denied.

Like every other filing in an appellate court, a motion should be self-contained. The attorney should put in everything that is necessary to understand and intelligently consider the motion. In ruling on motions, the court frequently does not have a record to refer to. Even if a record is available, the court rarely turns to it to remedy the factual insufficiencies of a motion.

The best practice is always to attach all material exhibits. If the circuit court has previously passed on the issue, the attorney should be sure to include its memorandum decision or a transcript of its oral decision. On the other hand, the attorney also should

ensure that the motion itself tells the story, so that the reader is not forced to turn to the exhibits. They are there only to supplement the motion.

As in writing a good brief, *see supra* § 11.33, the goal in writing a good motion is to convey the argument in the most efficient and persuasive manner possible, while giving the court a full view of the facts necessary to understand the matter. Brevity is crucial. Except in unusual cases, the court will view a motion longer than 15 pages as a nuisance. A routine procedural motion should rarely run more than a few pages.

Parties need not provide draft orders with their motions. Orders are drafted by the appellate court's staff counsel. Also, there is no need for motions to be supported by affidavit, unless some disputed fact is at issue.

A party may file a response to any motion within 11 days after service of the motion, Wis. Stat. § 809.14(1), except in a termination-of-parental-rights case, in which a response must be filed within 5 days, Wis. Stat. § 809.14(1m). The preferred practice is always to file a response, even if the response only states that there is no opposition to the motion. Wis. Stat. § 809.14(2) provides that a court may act on a procedural motion without waiting for a response. If the court acts on a procedural motion before the timely filing of a response, the party adversely affected by the motion may file a motion for reconsideration within 11 days after service of the order. Wis. Stat. § 809.14(2).

The rules neither prohibit nor authorize the filing of a reply. It is acceptable, however, for a party to file a reply, although there is no certainty that the court will consider it.

The manner in which motions are decided in the court of appeals and supreme court are outlined in the courts' internal operating procedures. *See infra* §§ 21.17, 27.23.

Note. Oral argument is sometimes granted on the court's own motion in unusual cases.

III. Filing, Service, and Form of Motion [§ 13.3]

As set forth in detail in sections 18.3 and 18.4, *infra*, appellate documents such as motions must be filed by paper parties in the Office of the Clerk of the Wisconsin Supreme Court and Court of Appeals in Madison or through the electronic filing (e-filing) system by e-filers. Motions for enlargement of time are governed by Wis. Stat. § 809.82(2). The format of motion documents (e.g. margins, typeface, etc.) is governed by the general rules for appellate filings. *See* Wis. Stat. § 809.81. Paper filers must be served by traditional means, but e-filers are served when the document is filed through the e-filing system. *See* Wis. Stat §§ 809.80, 809.801(4)(c).

IV. Effect of Filing Motion on Other Time Periods [§ 13.4]

The filing of certain motions is effective to stay all time periods under the rules of appellate procedure from the time of the filing of the motion to the date of its disposition. Wis. Stat. § 809.14(3). The only motions that trigger an automatic stay are those that "may affect the disposition" of an appeal or content of a brief, motions for consolidation of appeals, motions to supplement or correct the record, and motions relating to the production of a transcript. *See* Wis. Stat. § 809.14(3)(a), (b).

It is relatively easy to identify motions that might affect the content of the record or a brief, *see, e.g., supra* § 7.4, but motions that might affect the disposition of an appeal are not always as easy to identify. Motions going to the merits of an appeal (e.g., motions for summary disposition) obviously might affect the disposition and would cause an automatic stay. On the other hand, a motion to extend the time for filing a brief would not substantively affect the disposition of the case and would therefore not cause a stay. When in doubt, the attorney should ask the clerk of the appellate court whether filing of a particular motion extends the time period.

Parties should not assume that filing a motion will result in an automatic stay. The rules allow the court to decide procedural motions (those not going to the merits, for example, a motion to correct the record) without a response. Therefore, a motion could be decided the same day it is filed. Furthermore, if the court suspects a motion was filed for the purpose of obtaining an automatic stay, the court will swiftly deny the motion.

Supplement Chapter 14
Relief Pending Appeal—
Wis. Stat. §§ 809.12 and 808.07

Book sections supplemented: 14.1 and 14.2

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2022–23 supplement.

14.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

14.2 Authority to Grant Relief Pending Appeal

Page 2: Replaced Note

Note. An exception to the general rule that an appeal does not automatically stay the order or judgment appealed from has been recognized in appeals from involuntary medication orders. The supreme court created this exception based on its superintending authority (*see supra* § 2.7) in *State v. Scott*, 2018 WI 74, ¶¶ 43–44, 382 Wis. 2d 476, 914 N.W.2d 141 (reasoning that, absent a stay in such an appeal, defendant's liberty interests will be irreparably harmed). But the supreme court later limited the exception to allow automatic stays only in cases of *postconviction* challenges to involuntary medication orders; there is no automatic stay in appeals from *pretrial* involuntary medication orders. *State v. Green*, 2022 WI 30, ¶ 52, 401 Wis. 2d 542, 973 N.W.2d 770.

In addition, a legislatively created automatic stay exists in appeals taken from certification and decertification orders in class actions. Wis. Stat. § 803.08(11)(b).

Page 3: Added textual sentence and Waity *citation to end of paragraph after first numbered list in section*

These four factors are interrelated: more of one may excuse less of another, but the movant must always demonstrate more than a mere possibility of success on the merits. *Gudenschwager*, 191 Wis. 2d at 441. Particularly in cases presenting novel issues, the circuit court should consider not only its own view of the likelihood of success on appeal but also the standard of review and "how other reasonable jurists" might have considered the relevant law and whether they might have come to a different conclusion. *See Waity v. LeMahieu*, 2022 WI 6, ¶ 53, 400 Wis. 2d 356, 969 N.W.2d 263.

Chapter 14
Relief Pending Appeal—Wis. Stat. §§ 809.12 and 808.07

I. Scope

[§ 14.1]

Because an appeal does not automatically stay the execution or enforcement of an order or judgment, appellants ordinarily seek relief pending appeal. This chapter outlines the procedure and authority for granting relief and emphasizes that the circuit court is the preferred forum for relief. The provisions for ex parte and 24-hour emergency relief are also discussed. [1]

Relief pending disposition of petitions for leave to appeal and for supervisory relief are discussed in sections 9.12 and 10.4, *supra*. Temporary relief in criminal cases is discussed in sections 19.18–.21, *infra*.

II. Authority to Grant Relief Pending Appeal

[§ 14.2]

Wis. Stat. § 808.07(1) sets forth the general rule that an appeal does not automatically stay the execution or enforcement of a judgment or order being appealed. In most cases, the appellant will not be satisfied merely to file an appeal. Execution or enforcement of the judgment or order may render the appeal moot or cause the object of the appeal to become unattainable. For example, monetary awards may be exhausted, property may be disposed of, injunctions or denial of injunctions may cause irreparable damage, or the appellant may be required to part with something of value pending resolution of the appeal and could ultimately be left with a hollow victory. To avoid such results, a party should file a motion for relief pending appeal.

Note. An exception to the general rule that an appeal does not stay the order or judgment appealed from is in appeals from involuntary medication orders. *See State v. Scott*, 2018 WI 74, ¶¶ 43–44, 382 Wis. 2d 476, 914 N.W.2d 141. The extraordinary automatic stay in such cases is based on the supreme court's superintending authority (*see supra* § 2.7), and is required because, absent an immediate stay, the defendant's liberty interests may be irreparably harmed. *Scott*, 2018 WI 74, ¶¶ 43–44, 382 Wis. 2d 476. In addition, the legislature created an automatic stay in appeals taken from certification and decertification orders entered in class actions. Wis. Stat. § 803.08(11)(b).

Although Wis. Stat. § 808.07(2) vests both the circuit court and the appellate courts with authority to grant relief when an appeal is taken, Wis. Stat. § 809.12 requires a person seeking relief to file the motion in the circuit court first "unless it is impractical to seek relief in the trial court." The court of appeals has taken a very hard-nosed attitude regarding when it is impractical to seek relief in the circuit court, consistently refusing to find impracticality based on the simple fact that an appellant lost on the merits in the circuit court.

In at least two situations, however, the court of appeals generally will find impracticability. The first is when the circuit court is physically unable to grant relief because of illness, vacation, or some other absence. The second is when the circuit court has effectively precluded a motion for relief pending appeal by stating on the record that it will not grant such relief under any circumstances. *But see Gaugert v. Duve*, 2001 WI 83, ¶ 8, 244 Wis. 2d 691, 628 N.W.2d 861 (noting court of appeals had determined that circuit court direction that parties seek their stay in the court of appeals did not render impractical relief in the circuit court).

The reasons favoring a determination in the circuit court are apparent. The circuit court is familiar with the record and the parties. It is aware of the equities of the case and is in a substantially better position to impose appropriate conditions for granting relief pending appeal.

Relief may be sought in the circuit court throughout the appeal. This is recognized in Wis. Stat. § 808.07(2), which grants joint authority to the circuit and appellate courts to grant relief pending appeal.

Once the circuit court has ruled, the parties may seek review by filing a motion in the court of appeals for relief pending appeal. Wis. Stat. § 809.12. The circuit court's decision rests in the sound exercise of its discretion. *See State ex rel. Johnson v. Williams*, 114 Wis. 2d 354, 356, 338 N.W.2d 320 (Ct. App. 1983). When a circuit court denies a stay without stating any reasons, however, an erroneous exercise of discretion occurs. *Id*. The court of appeals reviews the decision to grant or deny a stay pending appeal as an exercise of discretion, not de novo. *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995).

The test for granting a stay pending appeal is stated in *Leggett v. Leggett*, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986). The motion must make

1. A strong showing that the moving party is likely to succeed on the merits of the appeal;

2. A showing that, unless a stay is granted, the moving party will suffer irreparable injury;

3. A showing that no substantial harm will come to other interested parties; and

4. A showing that a stay will do no harm to the public interest.

These four factors are interrelated: more of one may excuse less of another, but the movant must always demonstrate more than a mere possibility of success on the merits. *Gudenschwager*, 191 Wis. 2d at 441.

A somewhat different standard applies for granting a stay of a money judgment pending appeal. *See Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶¶ 18–25, 237 Wis. 2d 498, 614 N.W.2d 565. In such cases, courts should consider the following nonexclusive factors:

1. The likelihood of success on appeal;

2. The need to ensure collectibility of the judgment and interest;

3. The ability of the appellant, if successful, to recover the money if a stay is not granted;

4. Any harm to the respondent if the judgment is not paid; and

5. The public interest.

Id.

As with the *Leggett*/*Gudenschwager* test for a stay pending appeal, these factors are interrelated and must be weighed against one another. *Id.* ¶ 25.

In a statement applicable to both tests for granting a stay pending appeal, the court of appeals noted in *Scullion* that, contrary to the description of the first factor in *Leggett*, there need not necessarily be a "strong showing" that the movant is likely to succeed on the merits. In other words, a high probability of success on appeal is not necessarily required for a stay. Instead, the likelihood of success is weighed along with other factors, and the degree of likelihood of success that justifies the stay in a particular case will depend on the relative strength of the other factors. *Id*. ¶ 18 n.14.

Wis. Stat. § 808.07(2) delimits the authority of a court to grant relief pending appeal. In addition to staying the execution or enforcement of a judgment or order, the court may suspend, modify, restore, or grant an injunction and has broad authority to make any order necessary to preserve the status quo or the effectiveness of a judgment yet to be entered.

Wis. Stat. § 808.07(2)(am) authorizes the circuit court, during the pendency of an appeal, to hear and decide a motion filed under Wis. Stat. § 806.07 for relief from a judgment or order. An example of such relief would be vacating the order or judgment appealed from on the grounds of mistake or excusable neglect. Wis. Stat. § 806.07(1)(a). Wis. Stat. § 808.07(2) appears to provide a mechanism by which a circuit court could actually remove the basis for the appeal after the appeal has been taken. Indeed, all of Wis. Stat. § 808.07 is an exception to the general rule that a circuit court may not act on matters directly concerned with the subject matter of an appeal. *See Hunter v. Hunter*, 44 Wis. 2d 618, 621, 172 N.W.2d 167 (1969); *see also supra* § 2.9. The court of appeals has no concurrent authority to hear a motion filed under Wis. Stat. § 806.07. *See* Wis. Stat. § 808.07(2)(am).

The circuit court has broad discretion to condition the granting of a stay on terms it deems appropriate. *Estate of Matteson v. Matteson*, 2008 WI 48, ¶¶ 67–85, 309 Wis. 2d 311, 749 N.W.2d 557 (holding that court was authorized to order advance payment of postjudgment interest, even though appellant paid into court full amount of judgment). An undertaking for costs is generally not

required unless ordered in the discretion of the circuit court. Wis. Stat. § 808.07(3). However, the appellant may deem it strategically desirable to voluntarily consent to some type of undertaking in the motion filings for the purpose of enhancing the appellant's position on the motion. Wis. Stat. § 808.07(2m) limits the amount of the undertaking that can be set by the court.

III. Contents of Motion for Relief Pending Appeal [§ 14.3]

As emphasized in section 14.2, *supra*, a motion for relief pending appeal must first be brought in the circuit court unless it is impractical to do so. Wis. Stat. § 809.12 therefore requires that a motion for relief brought in the court of appeals show either that it was impractical to file the motion in the circuit court or, if the motion was filed in the circuit court, the reasons given by the circuit court for its action. The circuit court order denying the motion and, if available, the oral or written decision on the motion should be attached.

The motion must also present all facts necessary to understand the requested relief. This is particularly true in the court of appeals because the full record is usually not yet filed. If immediate action is needed, the first paragraph of the motion should say so. The motion should then support the claim for relief by showing dates of any relevant upcoming events, such as a sheriff's sale.

A memorandum should be attached to the motion, showing that the appeal is taken in good faith and based on meritorious arguments. Identify the issues on appeal and show why the circuit court was in error. A brief on the merits is not necessary, but the court must be persuaded that the appeal has a solid basis. There is no point in granting relief pending appeal unless there is a likelihood that the appeal will be successful.

The motion should show that a failure to grant relief would cause substantial injury and, conversely, that a stay would not unduly harm the other parties. Finally, address any public concerns that might arise if a stay is granted in the case.

Unless a motion for relief pending appeal is filed in the circuit court, it must be filed in the Office of the Clerk for the Wisconsin Supreme Court and the Court of Appeals using either traditional means, by paper filers, or the electronic filing (e-filing) system, by e-filers. *See* Wis. Stat. §§ 809.80, 809.801; *see also infra* §§ 18.3, 18.4. Paper parties must be served by traditional methods. Wis. Stat. § 809.80(2). Notice of e-filing through the e-filing system will constitute service on an e-filing party. Wis. Stat. § 809.801(6).

IV. Ex Parte and Emergency Relief [§ 14.4]

An appellate court judge may grant ex parte temporary relief, pending a final ruling on the motion for relief. Wis. Stat. § 809.12. A motion requesting ex parte relief still must be filed in the office of the clerk of the supreme court and court of appeals. The motion must clearly show the exigency that requires relief in advance of the 11-day response period applicable for most motions under Wis. Stat. § 809.14. The court will likely view with suspicion any motion for ex parte relief that is not brought as soon as possible.

The court of appeals' internal operating procedures provide that, in a clear emergency, a party may apply to an individual court of appeals judge before the filing of a motion with the clerk of court in Madison. *See infra* § 21.17. Such ex parte emergency relief will only be granted when the relief is required in fewer than 24 hours and the movant has not contributed to the emergency by delaying bringing the matter to the court.

Even under the emergency procedure, the movant must still prepare motion documents and file them and the ex parte order with the clerk of the court of appeals within 24 hours after obtaining the ex parte order. As with a normal ex parte order, the remaining parties may file responses within 11 days after service of the order. Wis. Stat. § 809.14(2). The court will then either continue or vacate the ex parte temporary relief.

Supplement Chapter 15
Expediting the Appeal

Book sections supplemented: 15.1 and 15.5

15.1 Scope

Pages 1–2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

15.5 Statutes Requiring Preferential Disposition

Page 7: Added paragraph 20A after paragraph 20 in numbered list

20A. Wis. Stat. § 809.108(4)—Appeals in proceedings related to political subdivision approvals (concerning applications for residential development).

Chapter 15
Expediting the Appeal

I. Scope
[§ 15.1]

Although the court of appeals' disposition rate compares favorably with the two-year delays experienced in the supreme court before the 1978 court reorganization, it can still take a year or more to obtain a decision. This chapter considers methods that can be employed to hasten the court of appeals' decision-making process. Some of the methods can also be used in the supreme court.[1]

Covered in this chapter are motions to advance, motions for summary disposition, and motions to bypass. Appeals that the legislature has mandated for expeditious disposition are also discussed. Finally, this chapter discusses the expedited (fast-track) appeals program.

II. Assignment and Advancement of Cases—Wis. Stat. § 809.20 [§ 15.2]

Wis. Stat. § 809.20 allows an appellate court to take cases under submission in such order and on such notice as it determines appropriate. This rule also provides that a party may move to advance submission of a case either before or after the briefs have been filed.

Except in unusual circumstances, cases are submitted to the court within 45 days after the filing of the last brief. *See infra* § 21.16. Submission may be delayed in consolidated cases or in cases that the court desires to decide jointly, to allow time for all briefs to be filed.

The court of appeals sends a notice to all parties 30 days before a case is actually submitted for a decision. This gives the parties, who may have forgotten to update the authorities supporting their cases, a final opportunity to inform the court by letter of any pertinent authorities discovered since the filing of the briefs. *See supra* § 11.31.

Including this 30-day notice period, the time from the filing of the last brief in a case to actual disposition of the appeal might be several months. Parties hoping to obtain a speedier disposition may file a motion to advance.

At a minimum, a motion to advance must recite (1) the nature of the public or private interest involved, (2) the issues in the case, and (3) how delay in submission would be prejudicial to the accomplishment of justice. Wis. Stat. § 809.20. Because the motion is intended to advance submission, it must be made early in the appellate process to be effective. If the briefs have already been filed, a motion to advance will likely be denied on the ground that the matter soon will be under submission.

As a practical matter, only exceptional cases will be advanced. In most instances, the appellant has already secured a stay of enforcement of the lower court judgment or order. Furthermore, parties must recognize that the advancement of one case means the delay of another case. A motion to advance must show that the case demands special treatment. Nevertheless, in an unusual case, a party should not hesitate to file a motion to advance following the general motion procedure outlined in Wis. Stat. § 809.14. *See also supra* ch. 13.

One of the most effective methods of obtaining an advancement is to move, shortly after the filing of the notice of appeal, for a shortening of the time periods required under the rules of appellate procedure. Pursuant to Wis. Stat. § 809.82(2), the court may alter most of those time periods (except the time for filing a notice of appeal in a civil case). Thus, a party could move to cut the time for filing the record and briefs in half and waive the 30-day notice of submission. If the other parties do not object, such a motion would probably be granted and, if so, would result in submission of the appeal several months sooner than normal.

Even if the court does not agree to advance or alter any time periods provided in the rules, significant time savings can sometimes be obtained by self-help advancement. The appellant should file the notice of appeal as soon as possible and encourage the court reporter and clerk of circuit court to file the transcripts and record earlier than required. In addition, the parties should consider filing an agreed statement in lieu of the record. *See* Wis. Stat. § 809.15(5). Early filing of briefs and waiver of reply briefs may save weeks. Furthermore, a party that demonstrates such a willingness to act with speed is more likely to succeed if a motion for advancement is filed.

III. Summary Disposition—Wis. Stat. § 809.21 [§ 15.3]

Pursuant to Wis. Stat. § 809.21, the appellate court, upon either its own motion or the motion of a party, may decide an appeal by summary disposition. A motion for summary disposition can seek affirmance, reversal, or dismissal. A respondent who believes an appeal to be without merit may move for summary affirmance of the circuit court's order or judgment. On the other hand, an appellant may move for summary reversal if the appellant believes the circuit court was so clearly in error and acted so contrary to well-established law in rendering its judgment that the errors will be readily apparent to the court of appeals.

Motions to dismiss an appeal will be granted if based on a jurisdictional defect (e.g., failure to timely file a notice of appeal). Although motions to dismiss are also commonly made in response to violations of the rules of appellate procedure, the court rarely, if ever, dismisses an appeal merely for failure to comply with a procedural rule. In such cases, the court generally orders compliance; it may also impose a monetary penalty. *See infra* § 18.11. In any event, a motion to dismiss does not go to the merits of an appeal and therefore is not a vehicle for expedited disposition on the merits. Consequently, the remainder of this discussion is confined to obtaining summary affirmance and reversal.

Although summary reversal may be based on a rule violation, *see* Wis. Stat. § 809.83(2), both summary reversal and summary affirmance generally go to the merits of an appeal. Most appeals are not suitable for summary disposition. To be summarily affirmed or reversed, the appeal must involve a clear-cut case.

If the case calls for an extensive factual or legal analysis, it is an unlikely candidate for summary disposition. As a general guideline, motions for summary affirmance or reversal that run 20 pages or more (excluding supporting exhibits) in and of themselves indicate that a case is inappropriate for summary disposition. Similarly, a case presenting more than one or two issues is generally inappropriate for summary disposition.

A motion for summary disposition should comply with the general motion requirements of Wis. Stat. § 809.14. Wis. Stat. § 809.21(2); *see supra* ch. 13. Because the motion seeks final disposition of the appeal, it should present all essential facts and be supported by a memorandum of law. The motion also should be supplemented with relevant exhibits, including any circuit court decision or memorandum opinion.

Bringing a motion for summary disposition that goes to the merits of a case may significantly delay the decision on the merits if the motion is denied. Once the motion is filed, 11 days are allowed for a response. Wis. Stat. § 809.14(2). The motion is then analyzed by the court's staff counsel, who generally prepares a written memorandum. Finally, the motion is submitted to the court for decision. It is not unusual for an order granting or denying a motion for summary disposition to be issued four weeks after the motion was filed.

Motions for summary disposition may be filed at any time, but they are generally inappropriate before the filing of the record and almost pointless after the case has been placed under submission. In the former instance, the court is loath to decide an appeal when it is unable to verify the record. In the latter instance, a motion for summary disposition merely serves to delay a case that has been fully briefed and is being decided on the briefs.

Denial of a motion for summary disposition does not necessarily presage the court's final disposition. The court often denies a motion for summary disposition simply because it concludes the case is not sufficiently clear-cut for disposition by order rather than opinion. Motions for summary disposition are generally inappropriate in the supreme court because cases accepted for review by that court are rarely clear-cut.

An appellate court may summarily dispose of an appeal on its own motion. This is a somewhat haphazard occurrence, however, because it depends primarily on fortuitous circumstances bringing the case to the court's attention.

The supreme court has rejected a claim that summary disposition violated the litigants' constitutional rights, although it noted that the litigants' argument on that point did not seem to be fully developed. *Christ v. Exxon Mobil Corp.*, 2015 WI 58, ¶¶ 71–74, 362 Wis. 2d 668, 866 N.W.2d 602. The court concluded that summary disposition was appropriate when the court of appeals found the issue to be controlled by a recent, unpublished court of appeals opinion presenting the same legal issue and nearly identical facts. *Id.* ¶¶ 14, 74.

IV. Bypass—Wis. Stat. §§ 809.60 and 809.61 [§ 15.4]

The rules of appellate procedure provide for three methods of bypassing the court of appeals and taking a case directly to the supreme court: bypass on petition of a party, bypass on motion of the supreme court, and bypass on certification of the court of appeals. These procedures are discussed in chapter 24, *infra*.

Although bypass can be considered a method of expediting a disposition of an appeal, the chances of obtaining a bypass on a petition by a party are small. During the 2020–21 term, approximately 31% (4 of 13) of such petitions that were disposed of were granted, and the court granted no such petitions (0 of 11) during the 2019–20 term. *Wisconsin Supreme Court Annual Statistical Report: 2020–2021 Term*, https://www.wicourts.gov/sc/DisplayDocument.pdf?content=pdf&seqNo=439770.

V. Statutes Requiring Preferential Disposition [§ 15.5]

In 1984, the court of appeals identified 15 statutes requiring preferential disposition in either the circuit court or appellate court and determined that all of the situations governed by these statutes should be given preference on appeal. Earl Hazeltine, *Expediting an Appeal, in Appellate Practice in Wisconsin* 95 (Nov. 1984). Since 1984, additional statutes giving preference have been enacted, and certain then existing statutes have been repealed or renumbered. The current statutes that author Michael S. Heffernan has been able to identify as giving preference are as follows:

1. Wis. Stat. § 30.30(3)(c)—Municipal authority to make harbor improvements;

2. Wis. Stat. § 32.61(3)—Eminent domain appeals;

3. Wis. Stat. § 48.915—Judgments granting or denying adoptions;

4. Wis. Stat. § 59.694(14)—County board of adjustment zoning appeals;

5. Wis. Stat. § 62.23(7)(e)15.—City planning zoning appeals;

6. Wis. Stat. § 62.50(21)—Orders regarding discipline of police and fire department employees in 1st class cities;

7. Wis. Stat. § 66.0203(7)(b)—Actions contesting municipal incorporation;

8. Wis. Stat. § 66.0216(6)—Actions contesting validity of incorporation;

9. Wis. Stat. § 66.0217(11)(b)—Actions contesting annexations;

10. Wis. Stat. § 66.0413(1)(g) & (h)—Orders regarding razing buildings;

11. Wis. Stat. § 70.47(13) & (16)(a)—Review by certiorari of real and personal property tax assessments;

12. Wis. Stat. § 75.521—Tax lien foreclosures;

13. Wis. Stat. § 78.72—Proceedings regarding aviation and vehicle fuel taxes;

14. Wis. Stat. § 87.16—Flood control proceedings;

15. Wis. Stat. § 103.59—Injunctions in labor disputes;

16. Wis. Stat. § 111.07(11)—Unfair labor practice appeals;

17. Wis. Stat. § 227.59—Administrative reviews certified from Dane County Circuit Court to other circuit courts;

18. Wis. Stat. § 227.60—Questions of state law referred to state courts by federal courts;

19. Wis. Stat. § 809.104(2)(f)5.—Appeals and petitions for certification in electronics and information technology manufacturing zone cases.

20. Wis. Stat. § 809.107(6)(e) & (f)—Appeals and petitions for review in termination-of-parental-rights cases; and

21. Wis. Stat. § 968.30(9)(b)2.—State's appeals from orders denying applications for wiretapping.

In addition to these preferences mandated by statute, each of the four court of appeals districts has a policy favoring expedited disposition of criminal and one-judge appeals when possible. Hazeltine, *supra*.

Apparently, appeals given statutory preference must be immediately placed under submission when the briefs are filed and thereafter be given top priority in the decision-making process. It seems the court should look favorably upon any motion to advance submission or expedite the appeal by altering time periods. *See supra* § 15.2.

A problem that has surfaced, however, is the identification of cases deserving statutory preference. Unless the parties inform the court, the court is often unaware that an appeal should be preferentially treated. Therefore, Wis. Stat. § 809.10(1)(b)4. requires that the notice of appeal state whether the appeal is one of those given preference by statute.

VI. Expedited Appeals (Fast-Track) Case Management [§ 15.6]

A. In General [§ 15.7]

The most significant effort to deal with appellate delay and backlog since the creation of the court of appeals in 1977 is the court of appeals' expedited appeals (fast-track) program. Wis. Stat. § 809.17 expressly authorizes this program. The expedited appeals program is described at length in the court of appeals' internal operating procedures. *See infra* ch. 21.

The program is designed to expedite cases that are suitable for shorter briefing periods, shorter and less formal briefs, immediate submission, priority on the court calendar, and disposition, generally, by order rather than signed opinion. All cases are eligible for the program except for (1) appeals in proceedings involving waiver of parental consent to an abortion under Wis. Stat. § 809.105, (2) appeals in termination-of-parental-rights proceedings under Wis. Stat. § 809.107, (3) no-merit appeals under Wis. Stat. § 809.32, (4) postconviction appeals under Wis. Stat. § 974.06(7), (5) cases under Wis. Stat. ch. 980, (6) cases in which any party is self-represented, and (7) most cases under Wis. Stat. § 809.30 (except for cases under Wis. Stat. ch. 48, 51, 55, or 938). *See infra* §§ 21.28–.32 (Wisconsin Court of Appeals Internal Operating Procedures).

The program has two distinct stages. The first is a screening process to determine whether the case is one that might be decided in an expedited, informal manner. The second is the fast-track, expedited appeal itself, through which cases identified in the screening process are given expedited treatment. Although participation in the program itself is voluntary, all parties are required to go through the screening process consisting of (l) the filing of an informational docketing statement, *see infra* § 15.9, and (2) attendance at a presubmission conference between the parties and a court staff attorney if such a conference is ordered, *see infra* § 15.10.

B. Eligible Cases [§ 15.8]

Although no hard-and-fast rules exist, cases with limited, easy issues are most likely to meet the criteria for an expedited appeal. Single-issue, error-correction cases, for instance, are ideal, while complex, multi-issue cases are unlikely candidates. *See* Burton Scott, *Fast-Tracking Expedites Appeals*, Wis. Bar Bull., Nov. 1984, at 23.

The most important variable in determining whether a case is appropriate for the program is the number of issues involved in the appeal. The most likely cases have only one or two issues. Districts I and II limit fast-track cases to three issues. Ronald Hofer, *Fast-Tracking in the Court of Appeals*, Milw. Law. (vol. 8, no. 3), 1985, at 15, 16.

Another important factor in determining a case's suitability for the fast-track program is the complexity of the issues. A case presenting difficult issues will generally require extended research and will not be suitable for the program's shorter briefing periods and informal briefs.

C. Docketing Statement and Response [§ 15.9]

The first step in the expedited appeal screening process is filing the docketing statement. The statement, which is essentially a questionnaire, must be filed in the circuit court at the same time as the notice of appeal. Wis. Stat. § 809.10(1)(d). Copies of a form docketing statement may be obtained from the local clerks of the circuit courts. Electronic versions of the docketing statement form are available on the Wisconsin Court System's website, *Court of Appeals Forms*, https://www.wicourts.gov/forms1/appeals.jsp (last updated Sept. 7, 2021), either as a Microsoft Word document or as a PDF file. The preparation and filing of the docketing statement does *not* suspend any of the appellate time limitations, such as the time limitation on ordering the transcript.

The appellant must serve a copy of the docketing statement on the respondent. For e-filing parties in the circuit court case, receipt of the docketing statement through the e-filing system constitutes service. Wis. Stat. § 809.10(1)(h). The respondent may file a one-page response within seven days after receiving the statement. If the respondent has filed a cross-appeal, a separate docketing statement must be filed. *See infra* § 21.30 (Wisconsin Court of Appeals Internal Operating Procedures).

Failure to timely file the statement may lead to the imposition of sanctions pursuant to Wis. Stat. § 809.83(2).

The purpose of the docketing statement is to convey basic information about the case. The appellant identifies the parties and the circuit court and then provides jurisdictional information intended to show whether the appeal was timely filed and taken from an order or judgment appealable as a matter of right. The docketing statement thus plays an important role in identifying jurisdictional defects early in the proceedings.

In addition to covering the jurisdictional information, the person preparing the docketing statement must provide a brief description about the nature of the case. Was it a jury trial or a trial to the court? Was the case dismissed before trial? How long did the proceedings last? How did the case arise and how did the circuit court resolve it?

The appellant must specify the issues that will be raised on appeal and indicate whether they were raised in the circuit court and, if so, the manner in which they were disposed. This requirement alerts appellants to the general rule that issues must be raised in the circuit court before an appeal, *see supra* §§ 3.3–.10, and identifies potential waiver or forfeiture problems if the issues were not so raised. In addition, by identifying the number and type of issues that will be presented on appeal, the statement gives the court of appeals some idea of the complexity of the appeal.

The docketing statement requires the appellant to identify the standard of review for each issue. As noted in section 3.11, *supra*, standards of review limit the nature of the court's review, and a party that knows the standard of review on a particular issue is better able to determine which issues are likely to succeed on appeal. Identifying standards of review in the docketing statement ensures that the appellant is aware of them and may help to narrow the issues raised. And, observing how appellants have complied with this requirement has revealed that many attorneys are simply not familiar with the concept of standards of review. The docketing statement therefore serves an educational function in addition to helping the court determine whether the issues are appropriate for fast-track disposition.

Next, the docketing statement inquires as to the need for oral argument and publication. Presumably, if the case meets the criteria for oral argument and publication, *see supra* § 12.2 & *infra* ch. 17, it is not appropriate for expedited disposition. Cases satisfying the criteria for publication or oral argument, which may generally be considered cases of first impression or cases of importance in the administration of justice, should not be fast-track cases because they typically require extended reflection and copious research, not expedited disposition. A decision to accept expedited disposition does not, however, necessarily foreclose oral argument or publication. Some fast-track cases have been published.

The docketing statement also asks whether the appeal would lend itself to an expedited disposition through either summary disposition or disposition on shorter briefs and a reduced briefing schedule. If the answer given is "No," the court will usually accede to the appellant's wishes and will not schedule a presubmission conference. *See infra* § 15.10.

Finally, the docketing statement must have attached to it a copy of the circuit court's decision, opinion, or findings, in addition to a copy of the judgment or order being appealed. This requirement reflects the court of appeals' view that the circuit court's decision is perhaps the most illuminating document in the record. It also reflects the deference often paid to the circuit court in the standards of appellate review.

Although attorneys have expressed concern about their ability to accurately and completely prepare the docketing statement at such an early stage in an appeal, preparation of the statement should not present a problem.

The key to drafting the docketing statement is to be as complete as possible and to act in good faith. An attorney who bears this in mind will have no problems. An attorney is not bound by an answer or omission on the statement or response. The procedures accompanying the statement expressly provide that failure to include any matter in the docketing statement does not constitute a waiver and that although briefing an additional issue may cause a case to be withdrawn from the fast-track program, the parties are not prohibited from briefing issues not raised in the docketing statement. The court may, however, impose sanctions on counsel or the party filing the docketing statement if it appears that the attorney has withheld available information.

The respondent may file a one-page response to the appellant's docketing statement. Some respondents have questioned this one-page limit, claiming that it may be inadequate if the docketing statement mischaracterizes the case. Because no case goes directly from a docketing statement onto the fast track, however, a safeguard is built into the system. All fast-track cases must go through further screening at a presubmission conference. Indeed, it is often unnecessary for the respondent to file a reply at all. Objections may be raised, if necessary, at the presubmission conference, assuming one is held. If no conference is held, the case will generally not be fast-tracked, and any misstatements or ambiguities in the docketing statement will be irrelevant because the statement is not part of the record on which the appeal is decided.

Once the docketing statement is completed, it is reviewed by a court of appeals staff attorney to determine whether a presubmission conference is necessary. The present practice is to schedule a presubmission conference on all appeals that appear potentially suitable for fast-tracking after review of the docketing statement.

D. Presubmission Conference [§ 15.10]

Expedited appeals, which are also referred to as fast-track appeals, are offered in Districts II, III, and IV. In Districts II and III, if the appellant's docketing statement indicates interest in an expedited appeal, and if the docketing statement shows that the case may be appropriate for placement on the expedited appeals calendar, a court of appeals staff attorney may require that the parties attend a presubmission conference to determine whether the case is appropriate and, if so, to obtain consent of all parties to place the appeal on the expedited appeals calendar. The conference is held by telephone. Counsel with full authority to make decisions concerning expedited disposition must attend the conference. The conference is presided over by a staff attorney (referred to as the conference attorney) and usually takes 10–20 minutes.

In District IV, if the appellant's docketing statement indicates interest in an expedited appeal, and if the docketing statement shows that the case may be appropriate for placement on the expedited appeals calendar, a court of appeals staff attorney will communicate with the parties in writing to obtain consent from all parties to place the appeal on the expedited appeals calendar.

To encourage the frank discussion necessary to effectively consider such topics as narrowing or eliminating issues on appeal, all matters discussed at the conference are confidential. To help ensure confidentiality, the court does not permit the conference attorney to participate in the final disposition of the appeal.

The conference is an informal conversation between the conference attorney and counsel for the respective parties. It does not require extensive preparation, but counsel should be prepared to discuss whether the case should go on the fast track. The court's procedures indicate that the parties themselves may be directed to attend or participate in the conference; however, this is rarely, if ever, required. At the conference, the conference attorney explains the fast-track system and tries to persuade the parties to limit the issues as much as possible. Limiting the issues is often a prerequisite to expedited disposition.

The parties have considerable input into the decision to put a case into the expedited appeals program. Unless the conference attorney feels the attorneys are underestimating the difficulty of the case, the conference attorney will usually recommend fast-tracking when both parties agree.

The decision to submit an appeal on the fast-track program must be approved by the presiding judge. The judge will issue an order embodying the parties' consent to submission on an expedited basis and set forth the expedited briefing rules. The order may expressly limit the briefs to one or two issues, with the proviso that the appellant must not submit more issues without notice to the court and with the further proviso that more extensive briefing might result in the case being removed from the fast-track program.

Although the court has authority to make participation in the expedited appeals program mandatory, at present, participation is strictly voluntary. Thus, although the parties must file the docketing statement and appear at the presubmission conference if one is held, they need not submit the appeal on an expedited basis.

The court's procedures provide that any order issued by the presiding judge upon recommendation of the conference attorney is subject to reconsideration if a motion is filed within five days after the date of the order. *See infra* § 21.32. This provision is consistent with the voluntary nature of the fast-track program. Similarly, it would appear that a later motion to withdraw from the fast-track program would be favorably received unless prejudice to the other party is shown.

E. Briefing and Decision [§ 15.11]

An appeal that has been accepted for the fast-track program will have shortened briefing schedules and shorter briefs, *see supra* § 11.29; immediate submission for decision on filing of the briefs; and priority over other cases under submission. Even if the court does not order early filing with the record, several months can be saved under the fast-track program. Some appeals are decided in half the time they would otherwise take. *See* Scott, *supra* § 15.8, at 23.

The program's expedited briefing schedule saves about one month. The most significant time savings, however, result from the immediate submission once the briefs are filed and from the priority decision. Immediate submission eliminates the 30-day notice of submission, and the priority of placement of the case on the court's calendar generally means the parties receive a decision within one month after submission. Together, these represent a minimum savings of three months in the disposition process.

Expedited briefing schedules and priority placement on the decision calendar would not achieve any significant time savings, however, without shorter briefs. But as a trade-off for the requirement of filing shorter briefs in less time than in other cases, the

parties to an expedited appeal benefit from the promise of an early decision and the informal briefing format described in section 11.29, *supra*.

Once the briefs are filed in an expedited appeal, they are submitted to the court and considered at a weekly decision conference. The judges read the briefs before the conference. At the conference, they discuss the case and reach a decision while reviewing as much of the record as necessary. The matter is then assigned to a staff attorney to draft an order, which should not exceed two single-spaced pages; the order disposes of the appeal in accordance with the judges' decision.

At the decision conference, it sometimes becomes apparent that the case is not suitable for the fast-track program; either the case is more complex than had been anticipated or the briefs are totally insufficient. The court then issues a notice that the case has been removed from fast-track submission, and the court may order further briefing.

The judges like the expedited appeals program. Reading briefs places a significant demand on a judge's time, and the shorter briefs of fast-track cases are clearly welcome.

Because of advantages from the fast-track disposition program, many participants may view the system favorably. The savings in time and money can be particularly significant to solo practitioners or small firms whose clients might not otherwise be able to afford an appeal.

It would be incorrect to assume, however, that there are no problems or potential problems with the fast-track program. The concern over quality versus quantity is real. The Wisconsin Supreme Court rarely reviews the merits of a court of appeals decision. The court of appeals is, in most cases, the court of last resort, which is significant in a fast-track appeal because the opinions tend to be conclusory. Nonetheless, the overwhelmingly favorable reactions to the program indicate that attorneys apparently believe that their cases are receiving quality review in the court of appeals.

Of great concern is the party that agrees to fast-track participation, realizes too late that the case cannot be presented in a 15-page brief, and attempts to meet that limit anyway by inadequately briefing the facts or the law or both. The result, at best, may be an expenditure of effort by the court that is out of proportion to the actual difficulty of the case and in excess of that which would have been required had the case been briefed under the normal rules. The worst result may be an ill-informed decision.

This situation points up the importance of the docketing statement and presubmission conference in screening fast-track cases, as well as the importance of the parties and the court working to ensure that only appropriate cases will be placed on the fast track. When inappropriate cases are not screened out and remedial briefing is necessary, delays may exceed the delays in cases not handled in the fast-track program.

The fast-track system presents one of the best hopes for dealing with the appellate backlog while maintaining and even increasing the accessibility of appellate review. As with any other appellate disposition, the quality of a fast-track disposition depends on the efforts of both the attorneys and the judges involved. To ensure continued success of the program, both the parties and the court must view potential fast-track cases with a critical eye and never consider a case selected for expedited disposition as unworthy of hard work or thoughtful consideration.

VII. Appellate Mediation [§ 15.12]

Wis. Stat. § 809.17(2m) authorizes the court of appeals to establish a mediation program. Like the fast-track program, participation in the screening process would be mandatory, but participation in actual mediation would be voluntary. Except for a brief trial run, now ended, the mediation program is inactive, with no plans for resumption.

Supplement Chapter 16
Postdecision Procedures

Book sections supplemented: 16.1 and 16.5

16.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

16.5 [Costs—Wis. Stat. § 809.25] Frivolous Appeals

Page 5: Replaced first paragraph in section

Special provision is made for awarding costs and fees in appeals or cross-appeals that the court of appeals or supreme court finds frivolous. Wis. Stat. § 809.25(3); *see also* Wis. Stat. § 895.044(4), (5). The courts have been reluctant to use this procedure, however, partly because it requires the court to make a finding of frivolousness. Pre-2011 case law had established that the court could not award costs and fees under Wis. Stat. § 809.25(3) unless the entire appeal was frivolous. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶ 26, 277 Wis. 2d 21, 690 N.W.2d 1. A statute enacted in 2011 seemed to contradict *Baumeister*'s "entire appeal" rule, by stating that an appeal is frivolous "if any element necessary to succeed on appeal is supported solely by an argument" that is frivolous. Wis. Stat. § 895.044(5). Subsequent case law, however, has clarified that this language did not change the basic rule that the entire appeal must be frivolous to meet the standard for imposing sanctions. *See Thompson v. Ouellette*, 2023 WI App 7, ¶¶ 41–44, 406 Wis. 2d 99, 986 N.W.2d 338. But the meaning of "entirely frivolous" is no longer as it was articulated in *Baumeister*. *Id.* ¶ 43. An appellant cannot avoid a finding of frivolousness by pointing to a valid argument if that argument is not necessary for success on appeal and if the argument necessary for success on appeal is, in fact, supported by frivolous argument. *See id.* ¶¶ 44, 59. *Thompson* recognized, however, that there is confusion inherent in the interplay of Wis. Stat. §§ 809.25(3) and 895.044(5) that will likely be the subject of future litigation. *Id.* ¶ 48.

Once a court makes a finding of frivolousness, the court must award fees and costs. *Jackson v. Benson*, 2002 WI 90, ¶ 6, 255 Wis. 2d 24, 647 N.W.2d 815.

Chapter 16
Postdecision Procedures

I. Scope
[§ 16.1]

Once the court issues its decision on an appeal, several rules come into play. This chapter describes the procedures for obtaining reconsideration and recovering costs, including costs in frivolous appeals. Remittitur of the record and proceedings on remand, including substitution of judge, are also outlined. Finally, the chapter discusses the retroactive versus prospective application of appellate holdings. [1]

II. Reconsideration—Wis. Stat. § 809.24 [§ 16.2]

Wis. Stat. § 809.24 provides that a party may file a motion for reconsideration in the court of appeals, except in an appeal under Wis. Stat. § 809.105 (abortion appeals) or 809.107 (termination-of-parental-rights appeals). Wis. Stat. § 809.24(4). A motion for reconsideration under Wis. Stat. § 809.24 is available only for the final decision of the court of appeals. Intermediate (procedural) orders may be reconsidered under Wis. Stat. § 809.14(2). A motion under Wis. Stat. § 809.24 must state with particularity the points of law or fact alleged to be in error and must include supporting argument. No response may be filed unless ordered by the court.

Both the motion and response, if any, must be brief; neither may exceed five pages if a monospaced font or handwriting is used or 1,100 words if a proportional serif font is used.

A motion for reconsideration must be filed within 20 days after the date of a court of appeals decision. Wis. Stat. § 809.24(1). This 20-day period cannot be enlarged. Wis. Stat. § 809.82(2)(e). In response to the motion, the court may issue either an amended decision or an order denying the motion. Wis. Stat. § 809.24(2). The court may order a response before issuing an amended decision. Wis. Stat. § 809.24(1).

The court of appeals rarely grants reconsideration on issues that were already argued and considered. Reconsideration is most often granted when the court has overlooked an issue or an authority or has made some error of fact.

Reconsideration in the court of appeals may occur at any time before remittitur or within 30 days after the filing of a petition for supreme court review. Within this time period, the court may also reconsider its decision on its own motion. Wis. Stat. § 809.24(3).

Timely filing of a motion for reconsideration stays the remittitur, Wis. Stat. § 809.26(1), and tolls the time for filing a petition for supreme court review, Wis. Stat. § 808.10(2). In fact, a petition for review cannot be filed until the motion for reconsideration is denied or the court of appeals issues an amended opinion. Wis. Stat. § 809.62(1m)(b).

III. Costs—Wis. Stat. § 809.25 [§ 16.3]

A. In General [§ 16.4]

The party prevailing before either the court of appeals or the supreme court is allowed costs. In addition to civil appeal proceedings, costs may be awarded in a leave-to-appeal proceeding, Wis. Stat. § 809.50(2), and in a supervisory-relief proceeding, Wis. Stat. § 809.51(3). A party seeking to recover costs must file a statement of costs within 14 days after the filing of the court's decision. An opposing party may file a motion objecting to the statement of costs within 11 days after the service of the statement. Wis. Stat. § 809.25(1)(c).

Unopposed statements of costs are taxed by the clerk as allowed under Wis. Stat. § 809.25(1)(b). Taxing is simply the act of the clerk evidencing the costs that are allowed. In cases terminated by opinion, the costs are taxed on the remittitur; in cases terminated by order, the costs are taxed on the order.

If there are irregularities or questions about the costs, the clerk will seek advice from a staff attorney, if the matter is in the court of appeals, or from the justice who wrote the opinion, if the matter is in the supreme court. If a motion objecting to costs is filed, the motion is generally ruled on by the judge of the court of appeals or the justice of the supreme court who signed the order or opinion terminating the matter.

It is usually easy to determine which party prevailed and is entitled to costs. Problems can occur, however, when cases are affirmed in part and reversed in part. To avoid confusion, the court should rule on costs in the mandate or body of the opinion. If the court awards costs, it must deal with difficult questions of how to measure the success of each party and how to apportion costs. The most common practice is to deny costs to both parties in these cases.

Comment. The denial of costs altogether is probably unfair to an appellant who, in the face of the standards of review favoring affirmance, obtains even a partial reversal, and who has had to bear the lion's share of the cost—filing fee, transcript fee, and two briefs—to obtain that result. In many cases, it would seem just to award costs to the appellant even if the appellant has obtained only partial relief.

Costs that are allowed to the prevailing party are as follows:

1. Because electronic filers (e-filers) generally need not serve paper copies in addition to the one filed with the court, *see* Wis. Stat. § 809.801(6), costs for assembling briefs and appendices are limited to documents served by traditional means. Wis. Stat. § 809.25(1)(b)1. Thus the only parties who can recover these costs are paper filers or e-filers who must serve a paper copy on paper filers. The maximum cost allowed is that "generally charged in Dane County, Wisconsin." *Id.* The cost now allowed under

that standard by the clerk of the court of appeals and supreme court is 15 cents per page. The clerk's office will consider requests for costs in excess of 15 cents per page if the request is supported by an invoice showing the actual cost, and the clerk deems the request reasonable. Parties need not supply invoices or receipts to support claims for costs at 15 cents per page.

2. Any fees charged by the clerk of the court of appeals or supreme court are allowed as costs. Wis. Stat. § 809.25(1)(b)2. These fees are set forth in Wis. Stat. § 809.25(2). The most obvious fee recoverable as costs would be the filing fee.

3. The cost for preparing the transcript or for appeal bonds is allowed. Wis. Stat. § 809.25(1)(b)3. Again, no invoice is necessary unless an objection is raised to the statement of costs.

4. Any fees charged by the clerk of the circuit court for preparation of the record may be awarded as costs under Wis. Stat. § 809.25(1)(b)4.

5. The court may award other costs as it directs. Wis. Stat. § 809.25(1)(b)5. The court has broad discretion to award all manner of costs under this subsection but rarely exercises that discretion. Common examples of costs that are often claimed, but not allowed, are postage, telephone calls, and attorney fees. *But see Sheely v. Department of Health & Soc. Servs.*, 150 Wis. 2d 320, 339–40, 442 N.W.2d 1 (1989) (holding that attorney fees properly may be awarded if party is required to participate in appeal concerning that party's right to recover statutorily authorized fees for legal services).

Costs allowed by the court of appeals are taxed in the court of appeals regardless of whether a petition has been filed for review in the supreme court. Wis. Stat. § 809.25(1)(d). If the petition is granted, costs are taxed again by the clerk in the supreme court upon completion of the review, superseding those taxed in the court of appeals. The taxed costs of the final appellate disposition are included in the remittitur or order terminating the review, which is then docketed by the clerk of the circuit court, whereupon it becomes enforceable as a judgment. Wis. Stat. § 806.16.

B. Frivolous Appeals
[§ 16.5]

Special provision is made for awarding costs and fees in appeals or cross-appeals that the court of appeals or supreme court finds frivolous. Wis. Stat. § 809.25(3); *see also* Wis. Stat. § 895.044(4), (5). The courts have been reluctant to use this procedure, however, partly because it requires the court to make a finding of frivolousness. Although case law had established that the court could not award costs and fees under Wis. Stat. § 809.25(3) unless the entire appeal was frivolous, *see Tennyson v. School Dist.*, 2000 WI App 21, ¶ 35, 232 Wis. 2d 267, 606 N.W.2d 594, the statutes now clarify that an appeal is frivolous "if any element necessary to succeed on appeal is supported solely by an argument" that is frivolous. *See* Wis. Stat. § 895.044(5). Once made, however, a finding of frivolousness *requires* an award of fees and costs. *Jackson v. Benson*, 2002 WI 90, ¶ 6, 255 Wis. 2d 24, 647 N.W.2d 815.

The court of appeals is constitutionally precluded from making factual determinations when the evidence is in dispute. *See Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). The issue whether the court of appeals is thereby barred from awarding fees under the frivolous-appeal statute has been raised but not decided. *Wisconsin Physicians Serv. Ins. Corp. v. Mitchell*, 114 Wis. 2d 338, 345, 338 N.W.2d 326 (Ct. App. 1983). In one case in which the court of appeals found frivolousness, the court characterized its finding as a conclusion of law. *Vierck v. Richardson (In re Est. of Koenigsmark)*, 119 Wis. 2d 394, 399, 351 N.W.2d 169 (Ct. App. 1984); *see also Lessor v. Wangelin*, 221 Wis. 2d 659, 669, 586 N.W.2d 1 (Ct. App. 1998).

To find an appeal frivolous, the court must find either that the appeal was taken in bad faith for the purpose of harassment or causing malicious injury, or that the appellant or the appellant's attorney knew or should have known that the appeal was without any reasonable basis in law or equity and could not be supported by a good-faith argument for an extension, modification, or reversal of existing law. Wis. Stat. § 809.25(3)(c)1., 2. A finding of bad faith is more difficult to make than a finding that the appeal was without a basis in law or equity. The *Koenigsmark* decision rested on the latter finding, which the court pointed out could be made from an examination of the briefs.

The standard for determining whether an appeal is frivolous is an objective one: what a reasonable person in the position of this litigant knew, or should have known, about the facts and law relating to the arguments presented. *Walag v. Town of Randall*, 213 Wis. 2d 424, 430, 570 N.W.2d 623 (Ct. App. 1997).

The court of appeals will not lightly find or conclude that an appeal is frivolous. When a motion is made to declare an appeal frivolous, the court must resolve all doubts in favor of finding the appeal nonfrivolous, unless the appeal was brought solely for purposes such as harassment or malicious injury or was without *any* basis in law or equity. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶ 28, 277 Wis. 2d 21, 690 N.W.2d 1.

An appellate court may reasonably conclude that an appeal is frivolous or in bad faith if the circuit court found the appellant's underlying action to be frivolous. *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 843, 520 N.W.2d 93 (Ct. App. 1994). In fact, affirmance of a circuit court's finding that the action below was frivolous renders the appeal frivolous per se. *Belich v. Szymaszek*, 224 Wis. 2d 419, 435, 592 N.W.2d 254 (Ct. App. 1999). This rule is now codified in Wis. Stat. § 895.044(4).

Careful attention to the appellate court's standards of review, *see supra* ch. 3, may prevent the filing of a frivolous appeal. For example, an appeal challenging a circuit court's determination as to credibility was held to be frivolous in *Lessor*, 221 Wis. 2d at 669. The court of appeals held that the appellant "should have known that an appeal to reverse the trial court's credibility determinations could not be successful under the long-standing law of this state." *Id*. Additionally, an appeal that seeks to overturn precedent will be viewed skeptically in light of the supreme court's strong commitment to the principle of stare decisis. *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592.

Wis. Stat. § 809.25(3)(a) provides that "the court shall award … costs, fees, and reasonable attorney fees" to the successful party if the court finds an appeal or cross-appeal frivolous. Costs and fees may be assessed against the offending party, the offending attorney, or both. Wis. Stat. § 809.25(3)(b). In an effort to discourage the repeated commencement of frivolous actions by a particular party in both the circuit and appellate courts, the court of appeals has ruled that, in addition to ordering the payment of costs, fees, and attorney fees, the court may bar an appellant from commencing future actions involving the same parties until those fees and costs are paid in full. *Puchner v. Hepperla*, 2001 WI App 50, ¶ 6, 241 Wis. 2d 545, 625 N.W.2d 609.

An allegation that an appeal is frivolous must be raised by motion; it can no longer simply be raised in a brief. *Howell v. Denomie*, 2005 WI 81, ¶ 19, 282 Wis. 2d 130, 698 N.W.2d 621. A motion to recover costs and fees must be made no later than the filing of the respondent's (or cross-respondent's) brief. Wis. Stat. § 809.25(3)(a). The court of appeals may raise frivolousness on its own motion, but must give notice that it is considering the issue. *Howell*, 2005 WI 81, ¶ 19, 282 Wis. 2d 130. In either case, the court must grant an opportunity to be heard before it makes a determination. *Id*. This may preclude the court of appeals from its established practice of finding per se frivolousness when it affirms a circuit court finding of frivolousness (see *Belich v. Szymaszek*, 224 Wis. 2d 419, 591 N.W.2d 254 (Ct. App. 1999), discussed *supra*) in the absence of separate notice and an opportunity to be heard. The court of appeals does not determine the amount of costs and fees for a frivolous appeal even when the circuit court is affirmed. Instead, it remands with directions to the circuit court to determine the proper amounts. *Lessor*, 221 Wis. 2d at 669. The circuit court has no authority to award costs or fees for a frivolous appeal unless directed to do so by the appellate court. *Morters v. Aiken & Scoptur, S.C.*, 2006 WI App 46, ¶ 14, 289 Wis. 2d 833, 712 N.W.2d 71.

In an effort to discourage frivolous criminal appellate proceedings, the legislature has created Wis. Stat. § 809.103, which requires prisoners to pay the filing fees for their appellate proceedings if the appellate court deems them frivolous. This statute requires the appellate court, after its final ruling, to notify the Wisconsin Department of Justice if it believes the appeal proceeding is frivolous.

IV. Remittitur—Wis. Stat. § 809.26 [§ 16.6]

Remittitur refers to both the document and the process by which the decision and mandate of the appellate court, along with the record, are returned to the circuit court. The mandate, which is the final judgment or order of the appellate court, is included in a document known as the remittitur. The remittitur formally remits or returns the record and competence to exercise complete jurisdiction to the circuit court so that the circuit court can carry out the mandate of the appellate court.

The clerk of the court of appeals must remit the record, decision, and mandate 31 days after the decision is filed or as soon thereafter as is practicable. Wis. Stat. § 809.26(1). This is 1 day after the 30-day period allowed for petitioning for review in the supreme court. Wis. Stat. § 808.10. The filing of a petition for review or a motion for reconsideration stays the remittitur. Wis. Stat. § 809.26(1).

Although Wis. Stat. § 809.82(2) allows the alteration of most time periods in the appellate rules, except the time for filing a civil appeal or a Wis. Stat. § 809.24 motion for reconsideration, there is a dispute as to whether the time for remittitur may be reduced. The general view is that the record must be kept in the appellate system for at least 30 days to allow for potential review in the supreme court. Although this would be appropriate in most cases, there is no jurisdictional basis for precluding early remittitur, and early remittitur could be important in some cases.

The significance of remittitur is that the circuit court has no authority to act on the mandate until receiving it in the remittitur. *State v. Neutz*, 73 Wis. 2d 520, 522–23, 243 N.W.2d 506 (1976). Thus, the court of appeals' mandate is effectively stayed until the circuit court can officially take cognizance of it in the remittitur.

The court of appeals has indicated an unwillingness to grant early remittitur. *See Kuechmann v. La Crosse Sch. Dist.*, 170 Wis. 2d 218, 226, 487 N.W.2d 639 (Ct. App. 1992). A party desiring early remittitur would have to show that delay in enforcing the mandate would cause substantial or irreparable harm. An adverse party could render the motion moot by filing a petition for review in the supreme court. Even if early remittitur occurred, a party could later file a petition for review, move to stay enforcement of the mandate, and transmit the record to the supreme court.

If the supreme court grants a petition for review, that court, upon filing its decision, will remit its judgment and opinion along with the record directly to the circuit court, unless the case is remanded to the court of appeals with specific directions. Wis. Stat. § 809.26(2).

The general rule is that an appellate court has no jurisdiction to vacate or modify its mandate after remittitur. *State v. American TV & Appliance, Inc.*, 151 Wis. 2d 175, 178, 443 N.W.2d 662 (1989). An appellate court may consider, however, a postremittitur motion to vacate when the basis for the motion is that the appellate mandate is void. *Id*. at 179–81.

V. Proceedings and Substitution on Remand [§ 16.7]

When the circuit court receives the record and remittitur, one of the following actions will occur:

1. If the trial judge is ordered to take specific action, the judge must do so as soon as possible. Wis. Stat. § 808.08(1).

2. If a new trial is ordered, it must be placed on the circuit court calendar upon receipt of the remitted record. Wis. Stat. § 808.08(2).

3. If any other action or proceeding is ordered, any party may, within one year after the circuit court's receipt of the remitted record, make an appropriate motion for further proceedings. Wis. Stat. § 808.08(3).

Attorneys should be aware that if further proceedings are not initiated by motion of the parties, the action will be dismissed at the conclusion of one year. *Id*. The circuit court, however, may grant an extension of the one-year period, upon notice, if the order for extension is entered during the one year. *Id*. As a practical matter, it is probably advantageous for an attorney to request a scheduling conference at which the court and the parties can decide how best to handle the enforcement of the appellate court decision; any other matters occasioned by the appellate court's decision can also be considered at the conference.

In the event of a reversal or modification, either of which will require further proceedings in the circuit court, any party may file a substitution-of-judge request within 20 days after the filing of the remittitur. Wis. Stat. § 801.58(7); *see also* Wis. Stat. § 971.20(7) (also requiring 20-day period in a post-appeal criminal case). The request for substitution must be filed in writing in the circuit court. *See State v. Zimbal*, 2017 WI 59, ¶ 31, 375 Wis. 2d 643, 896 N.W.2d 327 (applying Wis. Stat. § 971.20(7)). The filing may be done even if a substitution request had been made in the circuit court before the appeal. Wis. Stat. § 801.58(7); *see also* Wis. Stat. § 971.20(7). The general procedure for substitutions under Wis. Stat. § 801.58(1) applies. *See also* Wis. Stat. § 971.20 (criminal proceedings). Although strict compliance with the 20-day period for seeking substitution in writing is generally required, one case allowed a late filing when the circuit court denied a timely oral request and advised the defendant to wait to file a written motion until posttrial counsel was appointed. *See Zimbal*, 2017 WI 59, ¶ 52, 375 Wis. 2d 643.

A judge cannot avoid substitution by choosing a particular procedure on remand. *State ex rel. Ondrasek v. Calumet Cnty. Cir. Ct.*, 133 Wis. 2d 177, 394 N.W.2d 912 (Ct. App. 1986). The *Ondrasek* trial court took the position that substitution as of right is

available only when the remand is for "further proceedings." The court of appeals vindicated the principle of substitution as of right by holding that the trial court could not avoid substitution by deciding a remanded issue on briefs rather than on hearing (further proceedings). *Id*. at 184.

A remand for specific action—to apply the correct burden of proof to the previously established factual record—is not a remand for further proceedings entitling the parties to substitution of judge. *See Cuccio v. Rusilowski (In re Est. of Rusilowski)*, 171 Wis. 2d 648, 654, 492 N.W.2d 345 (Ct. App. 1992). Consistent with the legislative intent to liberally permit substitution, the supreme court narrowly construes the term "specific action" to cover a purely ministerial duty, requiring no exercise of discretion on remand. *State ex rel. J.H. Findorff & Son v. Circuit Ct.*, 2000 WI 30, ¶¶ 20, 22, 233 Wis. 2d 428, 608 N.W.2d 679.

The right to substitution on remand is limited in family law cases in which the judge against whom substitution is sought is familiar with the case because he or she has heard the original divorce action or subsequent proceedings *and* the remand is for a mere clarification rather than a new trial or hearing. *State ex rel. Parrish v. Kenosha Cnty. Cir. Ct.*, 148 Wis. 2d 700, 704–05, 436 N.W.2d 608 (1989). *Parrish* does not clearly delineate where the right to substitution ends and begins in the gray area between a remand for a simple clarification and a remand for a new trial. The court of appeals has clarified that there is no right to substitution on remand whenever a divorce judgment is remanded for further consideration "on the strength of the record developed at trial." *State ex rel. Hubert v. Winnebago Cnty. Cir. Ct.*, 163 Wis. 2d 517, 523, 471 N.W.2d 615 (Ct. App. 1991). Thus, the right to substitution on remand in a family law case is available only if further *evidentiary* proceedings are required on remand.

After substitution, the parties may stipulate to have the new judge decide the matter on the existing written record. *See Ladwig v Ladwig*, 2010 WI App 78, ¶ 13, 325 Wis. 2d 497, 785 N.W.2d 664. In that event, absent an express stipulation to the contrary, the judge may make new findings of credibility and weight even without the opportunity to observe the demeanor of the witnesses. *Id.*

If a circuit court refuses to comply with a mandate on remand or proceeds on an improper interpretation of the mandate, the appropriate remedy is to seek a writ of mandamus in the appellate court that issued the mandate. *State ex rel. Blackdeer v. Levis Twp.*, 176 Wis. 2d 252, 259, 500 N.W.2d 339 (Ct. App. 1993). The traditional view is that a circuit court on remand retains some discretion to resolve matters not addressed in the mandate, in a manner consistent with the mandate. *State ex rel. J.H. Findorff & Son*, 2000 WI 30, ¶ 25, 233 Wis. 2d 428.

If, however, the appellate court affirms without a remand or other clear directive, there is no authority for the circuit court to take further action. *See Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 50, 303 Wis. 2d 94, 735 N.W.2d 418.

VI. Retroactive Versus Prospective Application [§ 16.8]

The general rule is that appellate court decisions enunciating a new doctrine of law will apply retroactively to pending cases, and not only to cases arising after the decision. *Smith v. City of Milwaukee*, 2014 WI App 95, ¶ 10, 356 Wis. 2d 779, 854 N.W.2d 857. A decision will apply prospectively only after consideration of three factors: (1) whether the decision establishes a new rule of law by either overruling existing precedent on which parties may have relied or by deciding a case of first impression, resolution of which was not clearly foreshadowed; (2) whether retroactive application would impede or further operation of the new rule; and (3) whether retroactive application would produce substantial inequitable results. *Id.* ¶ 12.

Supplement Chapter 17
Publication of Opinions

Book section supplemented: 17.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

17.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 17
Publication of Opinions

I. Scope
[§ 17.1]

Not all opinions of the court of appeals are published, a situation that has far-reaching practical ramifications for attorneys. This chapter discusses the criteria the court uses to decide whether a court of appeals opinion will be published; the possibility of bringing a motion to have an opinion published is also discussed. The publication recommendation that parties must include in their briefs is discussed in section 11.12, *supra*.[1]

This chapter also highlights the procedure the court of appeals follows in deciding whether to publish its opinions. The rule allowing limited citation of unpublished opinions is discussed. Finally, the supreme court rules for publishing the supreme court's own opinions and orders are addressed.

II. Criteria for Publication; Motions to Publish [§ 17.2]

Wis. Stat. § 809.23 sets forth the criteria for publication of a court of appeals decision. The parties must address these criteria in the statement on publication required as part of the briefs. *See* Wis. Stat. § 809.19(1)(c); *see also supra* § 11.12.

Comment. It is ironic, though, that this statement—the only input required of the parties into the publication decision—is provided before the decision is written. Although a person may move for publication of a decision after it is written, it is clear that Wis. Stat. § 809.23 does not envision active participation by the parties in the publication decision.

Wis. Stat. § 809.23(1)(a) indicates that an opinion may be published when it

1. Enunciates a new rule of law or modifies, clarifies, or criticizes an existing rule;

2. Applies an established rule of law to a factual situation significantly different from that in published opinions;

3. Resolves or identifies a conflict between prior decisions;

4. Contributes to the legal literature by collecting case law or reciting legislative history; or

5. Decides a case of substantial and continuing public interest.

Wis. Stat. § 809.23(1)(b), on the other hand, provides that an opinion should *not* be published in any of the following circumstances:

1. The issues involve no more than the application of well-settled rules of law to a recurring factual situation.

2. The issues involve the sufficiency of the evidence to support a judgment, and the briefs reveal that the evidence is sufficient.

3. The issues are decided on the basis of controlling precedent, and no reason appears for questioning or qualifying that precedent.

4. The decision has been issued by a single court of appeals judge pursuant to Wis. Stat. § 752.31(2) and (3).

5. The decision is a per curiam opinion on issues other than appellate jurisdiction or procedure.

6. The opinion has no significant precedential value.

Wis. Stat. § 809.23(1)(a) provides that these criteria do not control or fully measure the court of appeals' discretion to order publication.

The available statistics do not reveal any pattern to publication, except that the number of published cases is small: 12% in 2020. Wis. Court of Appeals, *Court of Appeals Annual Report 2020*, https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=391847.

A motion for publication may be filed in any case, except in a one-judge appeal under Wis. Stat. § 752.31(2) and (3) or in a per curiam opinion that addresses issues other than appellate jurisdiction or procedure. Wis. Stat. § 809.23(4)(a), (b). Per curiam opinions addressing other issues, however, may be published by a roundabout procedure—by calling for a motion that the opinion be withdrawn, authored, and recommended for publication. Wis. Stat. § 809.23(4)(c).

Wis. Stat. § 809.23(4) allows a motion for publication to be made at any time and by any person, even a person who was not a party to the appeal. Therefore, an attorney who wishes to cite an unpublished decision may move to have it published, but a successful motion to publish would undoubtedly have to show that the case is one of statewide significance. Evidence that the opinion addressed a recurring fact situation or that circuit courts were taking different positions on the issue would also be important. The applicability of the unpublished case to the movant's situation would be insufficient, standing alone, to warrant publication.

Experience suggests, however, that once the court decides that an opinion should not be published, its decision is not lightly reversed. Moreover, a court of appeals decision not to publish an opinion is not reviewable by the supreme court. *State v. Keeley*, 92 Wis. 2d 426, 285 N.W.2d 141 (1979).

III. Procedure for Deciding Whether to Publish [§ 17.3]

Pursuant to Wis. Stat. § 752.41(3), the legislature has empowered the supreme court to determine, by rule, the manner in which the court of appeals decides which of its decisions will be published. Wis. Stat. § 809.23(2) sets forth the procedure, and it provides that the judges of the court of appeals who join in an opinion must make a recommendation as to whether the opinion should be published. Thereafter, a committee of court of appeals judges decides whether to publish the opinion. The committee is composed of the chief judge (or a judge of the court of appeals designated by the chief judge) and one judge from each court of appeals district, selected by the court of appeals judges of the district.

Comment. In a court as small as the Wisconsin Court of Appeals, it is relatively easy for this committee to be kept apprised of conflicts in unpublished opinions issued by the various panels. The committee has the power to determine which of the conflicting decisions, if any, will be given controlling precedential effect on the entire court of appeals as a result of publication. The committee thus may act as a sort of extraconstitutional tribunal.

IV. Rule Allowing Limited Citation of Unpublished Opinions [§ 17.4]

From the creation of the court of appeals in 1978 until July 1, 2009, it was well established that court of appeals unpublished opinions could not be cited as precedent or authority except to establish a claim of claim preclusion, issue preclusion, or law of the case. *See* Wis. Stat. § 809.23(3)(a). Effective July 1, 2009, however, and limited to opinions released on or after that date, unpublished opinions authored by either a three-judge panel or one judge can also be cited, not as precedent, but for their "persuasive value." Wis. Stat. § 809.23(3)(b). Citation of older unpublished opinions is allowable if used to establish law of the case, claim preclusion, or issue preclusion. Additionally, citation of older unpublished opinions is allowed when it is not for the purpose of showing persuasive value or precedence. *See Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, ¶ 33, n.14, 350 Wis. 2d 509, 835 N.W.2d 226 (citing *State v. Higginbotham*, 162 Wis. 2d 978, 996–97, 471 N.W.2d 24 (1991) (allowing citation to unpublished opinion in petition for review to show the court of appeals was taking inconsistent positions on the same issue)).

Note. Orders, memorandum opinions, and unpublished per curiam opinions are not included as unpublished opinions that may be cited for persuasive value pursuant to Wis. Stat. § 809.23(3)(b) because they are not opinions authored by a judge. *See, e.g.*, *State v. Obriecht*, 2014 WI App 42, ¶ 15, 353 Wis. 2d 542, 846 N.W.2d 479 (stating that unpublished per curiam opinions cannot be cited, and need not be considered by the court, even for persuasive value), *rev'd on other grounds*, 2015 WI 66, 363 Wis. 2d 816, 867 N.W.2d 387. But a per curiam opinion that addresses issues of appellate jurisdiction or procedure may be published and cited as authority. *See supra* § 17.2; *see also*, *e.g.*, *McConley v. T.C. Visions, Inc.*, 2016 WI App 74, 371 Wis. 2d 658, 885 N.W.2d 816 (per curiam) (addressing finality of order that left open claim for attorney fees).

Because unpublished opinions cited for their persuasive value are not precedent, they are not binding on any Wisconsin court. Wis. Stat. § 809.23(3)(b). Moreover, a court presented with a citation to an unpublished opinion need not distinguish or otherwise discuss the opinion. *Id*. Furthermore, a party has no obligation to distinguish, discuss, research, or cite the unpublished opinion. *Id*.

Comment. This last provision appears designed to address concerns that allowing citation of unpublished opinions, even for persuasive value, might create an ethical duty on behalf of lawyers to become students of unpublished opinions in addition to statutory and published case law.

Comment. The rule does not establish criteria for determining whether an unpublished opinion has persuasive value. It would appear that the value of such opinions will be determined on a case-by-case basis.

The interim and final reports of the Citation of Unpublished Opinions Committee, prepared for the Wisconsin Supreme Court in 2009 and 2012, provided the following standards for application of the rule:

1. *Tables of Cases and Appendix Table of Contents.* It may be useful to include citations to unpublished opinions in the table of cases in an appellate brief or petition, identifying them in a separate category as unpublished opinions.

   Note. Although not initially required, as of July 1, 2021, the appendix table of contents must "contain the citation of any unpublished opinion included in the appendix." Wis. Stat. § 809.19(2)(a).

2. *Citation Format.* When citing an unpublished opinion in a pleading or brief before any court, a party should include the case caption, docket number, unpublished designation, paragraph number, court, and date—for example, *Marquez v Herbeck*, No. 2010AP552, unpublished slip op., ¶ 19 (WI App Sept. 11, 2011). Public domain citations should not be used when citing to an unpublished opinion.

3. *Copy of Opinion for the Court*. A copy of each cited unpublished opinion must be placed in the appendix to any brief or petition for review, *see* Wis. Stat. §§ 809.19, 809.62, and should be attached to a motion in which the unpublished opinion is cited.

4. *Electronic Briefs, Petitions for Review, and Appendices*. In electronic documents filed with the court of appeals or supreme court, *see infra* § 18.3, a copy of any unpublished opinion cited in a brief or petition for review must be included in the electronic appendix. Hyperlinks to unpublished opinions may be included in the electronic brief or petition, but if an electronic version of the appendix is provided, a hard copy of the unpublished opinion must be scanned in as part of the appendix along with other appendix documents.

5. *Availability of Unpublished Opinions.* Access to unpublished opinions is available through the website of the Wisconsin Court System (https://www.wicourts.gov). Other sources include Westlaw (https://legal.thomsonreuters.com/en/products/westlaw), LexisNexis (https://www.lexisnexis.com/en-us/gateway.page), the Wisconsin State Law Library (https://wilawlibrary.gov), Fastcase (https://www.fastcase.com/), and Fastcase and Wisconsin Case Law, both provided by the State Bar of Wisconsin (https://www.wisbar.org). The *Wisconsin Law Journal* and the State Bar's CaseLaw Express (a weekly email notification service) also provide information about unpublished opinions.

See Citation of Unpublished Opinions Comm., *Final Report to Wisconsin Supreme Court* (Mar. 2012), https://www.wicourts.gov/publications/reports/docs/unpublishedopinionsfinal.pdf; Citation of Unpublished Opinions Comm., Interim Report to Wisconsin Supreme Court app. A (May 2009) (notice), https://www.wicourts.gov/publications/reports/docs/unpublishedopinions.pdf; *see also* Wis. Sup. Ct. Order Nos. 10-01, 10-02, 2010 WI 42, 323 Wis. 2d xxiii (eff. Jan. 1, 2011).

Comment. It is unclear how the court will handle citations to cases that have been ordered for publication, but not yet published, or cases that have been recommended for publication but not yet ordered for publication. Given the rule allowing citation of unpublished cases for persuasive value, it is clear that these opinions may be cited under that provision. Attorneys citing such cases should advise the court of the subsequent decision regarding publication.

V. Publication of Supreme Court Opinions, Orders, and Rules [§ 17.5]

Wis. Stat. § 809.23, governing publication and citation of appellate opinions, does not apply to the supreme court. The supreme court's procedures are addressed in SCR ch. 80. Unlike opinions of the court of appeals, all supreme court opinions are published. SCR 80.002. This includes per curiam opinions. *See* SCR 80.003 cmt. 4. Also, unlike orders of the court of appeals, supreme court orders may be published and, in some cases, must be published. The criteria for mandatory publication are set forth in SCR 80.003(1); those for discretionary publication are set forth in SCR 80.003(2). The determination to publish is made by a majority of the participating members of the court, or by the authority of the authoring justice if the order was issued by a single justice. SCR 80.003(3)(a), (b).

There is no rule prohibiting citation of unpublished supreme court orders, although the fact of nonpublication would indicate that an unpublished order has little persuasive value in most cases. The main purpose behind publishing orders appears to be to publicize orders that might assist attorneys by providing a scholarly critique of existing law or new interpretations, clarifications, or criticisms of laws or rules. *See* SCR 80.003 cmt. 1.

Supplement Chapter 18
Miscellaneous Procedures in the Court of Appeals and Supreme Court

Book sections supplemented: 18.1, 18.3, and 18.4

18.1 Scope

Page 2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023; and all references to Wisconsin Supreme Court Rules (SCR) are current through supreme court orders filed before and in effect on Oct. 4, 2023.

18.3 [Filing Procedures] Electronic Filing

Page 3: Updated date parenthetical in third paragraph in section

The *Appellate Court eFiling* page on the Wisconsin Court System's website, https://www.wicourts.gov/ecourts/efileappellate/index.jsp (updated Oct. 5, 2023), provides instructions on how to register for the appellate court e-filing system and how to file and access documents.

Page 3: Added Note *after paragraph 1 in numbered list*

Note. Because the circuit court and appellate court e-filing systems are separate, people who wish to participate in the appellate court e-filing system, including those required to do so, such as parties represented by counsel, must "opt in" to the appellate system. Instructions on how to do so are provided by the *Appellate Court e-Filing* page, *supra*, and in the notice of docketing provided by the appellate court clerk when a notice of appeal is filed in the circuit court.

Page 4: Deleted Caution

18.4 [Filing Procedures] Paper Filing

Pages 4–5: Added textual sentence to end of first paragraph in section

Parties not required to e-file (mostly self-represented persons) may choose to do so. Wis. Stat. § 809.801(3)(b). Absent making that choice, such parties (denoted "paper parties" by Wis. Stat. § 809.01(25)) will file, serve, and receive paper documents by "traditional methods," i.e. methods other than e-filing. Wis. Stat. § 809.01(31). In other words, paper parties are subject to the filing and service rules that were applicable to all appeals before the creation of e-filing. Those rules are set forth in Wis. Stat. § 809.80.

Page 6: Replaced last paragraph in section

Fax filing is allowed by Wis. Stat. § 809.80(3)(a) only as permitted by Wis. Stat. § 801.16. Service by fax is complete upon transmission. Wis. Stat. § 801.14(2). Filing by fax is allowed only by permission of the judge or local court rule. Wis. Stat. § 801.16(2)(a), (b). Both the court of appeals and the supreme court accept fax filings of documents as long as the filings comply with local rules. *See* Wis. Sup. Ct. & Wis. Ct. App., *Supreme Court and Court of Appeals Facsimile Rule* (eff. July 1, 2021), https://www.wicourts.gov/courts/appeals/docs/faxrules.pdf (identifying the types of documents that can be filed by fax, allowed document lengths, and the effective filing date for fax-filed documents).

Chapter 18
Miscellaneous Procedures in the Court of Appeals and Supreme Court

I. Scope
[§ 18.1]

This chapter discusses Wis. Stat. §§ 809.80–809.83, which primarily concern the filing and serving of documents in the appellate courts. Unless otherwise specified in the rules of appellate procedure, all documents must be in the form described in this chapter. Generally, all documents filed in an appeal must be filed electronically. *See infra* § 18.3.[1]

Caveats. Self-represented litigants may still file in the appellate courts by traditional (paper) means but may choose to file electronically. *See infra* § 18.4. In addition, the supreme court is phasing in its implementation of electronic filing (e-filing) procedures, with a pilot project that began on July 1, 2021. *See infra* ch. 22.

Note. See generally Wis. Stat. § 809.01 for definitions applicable to appellate procedure. *E.g.*, Wis. Stat. § 809.01(31) (defining traditional methods).

This chapter also discusses the procedures for computing the time periods for filing various documents and the procedures for enlarging or reducing those time periods by motion.

The other major emphasis of this chapter is on the penalty provisions for delays and rule violations. Only violations are commonly penalized.

Finally, the applicability of the rules of civil procedure and the provisions concerning the continuing duties of appointed counsel and guardians ad litem are considered. This includes a brief discussion of motions to withdraw and motions for substitution of counsel.

II. Filing Procedures [§ 18.2]

A. Electronic Filing [§ 18.3]

Wis. Stat. § 809.801 governs e-filing in the appellate courts. As noted in the 2021 comment to the statute, Wis. Stat. § 809.801 is very similar to the preexisting circuit court e-filing rule, Wis. Stat. § 801.18. *See also* Wis. Stat. § 809.801(2)(k) (providing that "circuit and appellate court electronic filing and service rules shall be interpreted consistently"). Thus, most attorneys should have little difficulty using the appellate e-filing system. For a summary of the appellate e-filing rules, see Sheila Reiff & Marcia L. Vandercook, *Technology: What You Need to Know: Mandatory Appellate Court eFiling Begins July 1*, Wis. Law., June 2021, at 45.

Mandatory e-filers are licensed Wisconsin attorneys, other attorneys appearing pro hac vice, and high-volume filing agents. Wis. Stat. § 809.01(19), 809.801(3)(a). Nonmandatory users may choose to e-file. Wis. Stat. § 809.801(3)(b). Otherwise, those users must file, serve, and receive paper documents by traditional means. *See infra* § 18.4.

The *Appellate Court eFiling* page on the Wisconsin Court System's website, https://www.wicourts.gov/ecourts/efileappellate/index.jsp (last updated Nov. 16, 2021), provides instructions on how to register for the appellate court e-filing system and how to file and access documents.

The basics of appellate e-filing are as follows:

1. All appellate documents must be filed in the appellate court through the e-filing system except the notice of appeal, the docketing statement, motions for a three-judge panel or a hearing in the county of origin, and the statement on transcript, which are e-filed in the circuit court. Wis. Stat. § 809.801(5)(c).

2. Service of appellate documents is accomplished when the document is e-filed. A notice of activity generated by the clerk will notify all electronic parties of filings and constitutes service on those users. Wis. Stat. § 809.801(4)(c).

3. Because paper parties (mostly self-represented persons) are not users of the e-filing system, they must be traditionally served with paper documents by e-filers. Wis. Stat. § 809.801(3)(c).

4. Although documents may be e-filed at any time, *see* Wis. Stat. § 809.801(4)(a), a submission must be completed by 11:59 p.m. central time on a particular day if the document is to be considered filed on that day. Submissions completed after 11:59 p.m. are considered filed on the next day. Wis. Stat. § 809.801(4)(am).

5. Multiple copies are no longer required to be filed or served in matters that formerly required them, e.g., appellate briefs and petitions for leave to appeal.

6. Special appellate proceedings, such as supervisory writs, original actions, and judicial disciplinary matters, may be initiated by e-filing in the appellate court, but a paper copy of the initiating document must be traditionally served unless the other party has

consented in writing to accept service by electronic means. Wis. Stat. § 809.801(5)(a).

7. Fees may be paid electronically or by check. Wis. Stat. § 809.801(7).

8. Documents requiring a signature may be either electronically signed or signed by a handwritten signature applied to a document before it is imaged. Wis. Stat. § 809.801(12). If electronically signed, an attorney may delegate authority to submit documents under that attorney's name. The permissibility of this delegation, since July 1, 2021, is an exception to case law, which had precluded delegation in traditional filing. *Brown v. MR Grp., LLC*, 2004 WI App 122, ¶¶ 6, 13, 274 Wis. 2d 804, 683 N.W.2d 481; *see supra* § 5.11.

Caution. E-filing in the supreme court is not yet in effect except for certain cases selected for test purposes. Thus, paper filing, actual attorney signatures, multiple copies, etc., are still required in most supreme court matters. *See infra* ch. 22.

B. Paper Filing
[§ 18.4]

Parties not required to e-file (mostly self-represented persons) may choose to do so. Wis. Stat. § 809.801(3)(b). Absent making that choice, such parties (denoted "paper parties" by Wis. Stat. § 809.01(25)) will file, serve, and receive paper documents by "traditional methods," i.e. methods other than e-filing. Wis. Stat. § 809.01(31). In other words, paper parties are subject to the filing and service rules that were applicable to all appeals before the creation of e-filing.

Except as specified by Wis. Stat. § 809.80(3)(b)–(e), all documents must be actually received by the clerk of the court of appeals or the clerk of the supreme court in the time fixed for filing by the applicable rule. Wis. Stat. § 809.80(3)(a). Filing is not complete upon mailing except in the limited circumstances explained below.

Therefore, if a person files a document by mail, adequate time should be allowed for delay in mail service. Documents mailed for filing should be addressed to the Clerk of the Court of Appeals or the Clerk of the Supreme Court (depending on which court is considering the case), P.O. Box 1688, Madison, WI 53701-1688.

Caution. Make sure that the post office box number is included in the address; documents mailed without the post office box number may languish in a mailroom for days before delivery.

In-person filings and deliveries must be made at the clerk's office in Madison: 110 East Main Street (Tenney Building), Suite 215. The clerk's main telephone number is (608) 266-1880. *See* Wis. Ct. Sys., *Administrative Offices, Clerk of the Supreme Court and Court of Appeals*, https://www.wicourts.gov/courts/offices/clerk.htm (last updated Dec. 10, 2021) (listing clerk's office hours and other information).

The exceptions to the actual receipt and timely filing requirement (sometimes collectively referred to as the *mailbox rule*) are as follows:

1. A brief or appendix is deemed filed on the date of mailing or delivery to a third-party commercial carrier if, on or before the last day of the time fixed for filing, it is correctly addressed and deposited in the U.S. mail, postage prepaid, or delivered to a third-party commercial carrier for delivery to the clerk within three days. Wis. Stat. § 809.80(3)(b). A person filing a brief or appendix in this manner must include a certification or affidavit setting forth the date and manner in which the document was mailed or delivered. A postage meter does not establish the date of mailing for this purpose. Wis. Stat. § 809.80(4).

2. A brief or appendix from a self-represented litigant confined in an institution is timely filed if the document is correctly addressed and delivered to the proper institutional authority for mailing on or before the last day for filing. These filings must be accompanied by a certificate or affidavit from the confined person stating the date on which the brief or appendix was delivered for mailing. Wis. Stat. § 809.80(3)(c).

3. A petition for review filed by a self-represented person confined in an institution is timely filed if the correctly addressed document is delivered to the proper institutional authorities for mailing on or before the last day for filing. A certification or

affidavit must set forth the date on which the document was delivered for mailing. Wis. Stat. § 809.80(3)(e).

Case law recognizes that the mailbox rule also applies to the filing of a notice of appeal by a self-represented prisoner. *See State ex rel. Kelley v. State*, 2003 WI App 81, 261 Wis. 2d 803, 661 N.W.2d 854.

Fax filing is allowed by Wis. Stat. § 809.80(3)(a) only as permitted by Wis. Stat. § 801.16. Service by fax is complete upon transmission. Wis. Stat. § 801.14(2). Filing by fax is allowed only by permission of the judge or local court rule. Wis. Stat. § 801.16(2)(a), (b). Both the court of appeals and the supreme court accept fax filings of documents as long as the filings comply with local rules. *See State v. Sorenson (In re Commitment of Sorenson)*, 2000 WI 43, ¶¶ 28, 35, 234 Wis. 2d 648, 611 N.W.2d 240. Fax filings are limited to 15 pages unless otherwise authorized by the court. Wis. Stat. § 801.16(2)(a). Documents transmitted by fax are considered filed on a particular day if submitted by 11:59 p.m. central time, as long as the clerk later accepts it on review. Wis. Stat. § 801.16(2)(f). Documents submitted by fax after 11:59 p.m. are considered filed the next day the clerk's office is open. *Id.*; *see also* Wis. Stat. § 809.80(3)(a).

III. Service [§ 18.5]

A. Service on E-filing Parties [§ 18.6]

The provisions for e-filing applicable to all attorneys have simplified the process of service. With the exception of a few special cases, e.g., the filing of initiating documents, *see* Wis. Stat. § 809.801(5)(a), the act of e-filing a document effects service on e-filing parties. Wis. Stat. § 809.801(4)(c). Although paper parties do not e-file, the e-filing system has relieved them of most service obligations because after paper parties file paper documents, the clerk will enter them into the e-filing system, thus effecting service on e-filing parties. *See* Wis. Stat. § 809.80(2)(c), (d).

B. Service by Traditional Methods [§ 18.7]

Paper parties must still be served by traditional means. Wis. Stat. § 809.80(2)(e). And as noted above, certain special cases, e.g., writs and original actions, must still be initiated by traditional service. Wis. Stat. § 809.801(5). The following discussion should be viewed in light of this limited context.

Wis. Stat. § 809.80(2)(a) defines *service by traditional methods* as "service in the manner provided in [Wis. Stat. §]801.14(1), (2), (2m), and (4)." The requirements of Wis. Stat. § 801.14(1) add little to Wis. Stat. § 809.80(2), except to specify that documents must be served on each party. Service on the state in criminal cases is governed by Wis. Stat. § 809.802.

Wis. Stat. § 801.14(2) describes the procedure for service. If a party is represented by an attorney, service must be on the attorney unless the court orders service on the party. Service may be by hand delivery, mail, or fax. Service by mail is complete upon mailing. Service by fax is complete upon transmission. In addition, service by email is permissible if an attorney (or a party, if appropriate) has consented in writing to accept service by email. *See* Wis. Stat. § 801.14(2). Service by email is complete on transmission, "except if the sender receives notification or indication that the message was not delivered." *Id.*

Delivery means handing the paper to the attorney or party or leaving it at the individual's office with someone apparently in charge; if no one is in charge, the paper may be left in a conspicuous place at the office. *Id.* If the office is closed or the person being served has no office, the paper may be left in the custody of someone residing at the person's place of abode. Mailings must be to the attorney's or the party's last-known address; if none is known, the paper should be left with the clerk of the court. *Id.*

Practice Tip. Affidavits of service are no longer required, although it is still a good practice to attach such affidavits to papers that are filed. This may help if problems with the service subsequently arise.

In place of a requirement for an affidavit of mailing, Wis. Stat. § 801.14(4) provides that filing a paper constitutes certification that the paper was properly served. Because filing constitutes certification of service, it is clear that service must take place before or, at the latest, simultaneously with filing.

The provision of Wis. Stat. § 801.14(2) that service is complete upon mailing is a rebuttable presumption that the party served actually has received the papers. *Mullen v. Braatz*, 179 Wis. 2d 749, 756, 508 N.W.2d 446 (Ct. App. 1993). If the intended recipient denies receipt, a factual issue is present that must be decided by the circuit court. *Id.*

IV. Form of Documents [§ 18.8]

The form of all documents filed in the court of appeals and the supreme court must follow the requirements of Wis. Stat. § 809.81, unless the rules expressly provide otherwise. The major example of documents not covered by Wis. Stat. § 809.81 are appellate briefs, which are filed under Wis. Stat. § 809.19 and are discussed in chapter 11, *supra*.

Note. Except for the heading of Wis. Stat. § 809.81(intro.), the word "document" rather than "paper" is used to describe filings because most filings, except by self-represented persons, will be by electronic means, not by filing actual paper documents. *See supra* § 18.3.

The requirements in Wis. Stat. § 809.81, as of July 1, 2021, regarding form are as follows:

1. All documents must formatted to fit an 8.5- by 11-inch page. Wis. Stat. § 809.81(1). Oversized documents that were filed in the circuit court must either be reduced or reproduced to fit multiple 8.5- by 11-inch pages. If this cannot be done for some reason, a party should confer with the clerk of the appellate court before filing.

2. As noted in sections 18.3 and 18.4, *supra*, only one document is filed with the court. Former Wis. Stat. § 809.81(2) (2019–20) (number of copies) is repealed.

3. All documents must be produced using a monospaced or proportional serif font or in legible noncursive handwriting, excepting handwritten signatures. Wis. Stat. § 809.81(3).

4. All documents must be double-spaced with a minimum of a 1.25-inch margin on the sides and a 1-inch margin at the top and bottom. Wis. Stat. § 809.81(4).

5. All documents must be paginated at the center of the bottom margin using sequentially numbered Arabic numerals starting with "1" on the first page. Wis. Stat. § 809.81(5).

6. Documents must be submitted using a process that produces a clear, legible, black image on a white background. Wis. Stat. § 809.81(6).

7. Any documents filed by paper filers must be secured together at the top left corner, presumably using staples. Wis. Stat. § 809.81(7).

8. In cases required by law to be confidential (e.g., juvenile cases), confidentiality is maintained by referring to individuals only by one or more initials or other appropriate pseudonym or designation. Wis. Stat. § 809.81(8).

   Note. Confidentiality must be maintained regarding confidential items included in the appellate record. Wis. Stat. § 809.801(14).

   Also, when "petitioner" has been substituted for an individual's name in cases involving domestic abuse protective orders or harassment injunctions, that term must be used on appeal. Wis. Stat. §§ 809.81(9) (captions), 809.19(1)(g) (briefs).

9. In all other cases, i.e., in all cases in which parties' names need not be protected, the caption of any document filed in the appellate court must include the full name of each party in the circuit court and must designate each party to identify its status in both the circuit court and the appellate court. The caption of a document filed in the supreme court must add the word "petitioner" to the designation of a party filing a petition for review.

Finally, all documents filed with the courts must provide the filer's name, address, telephone number, email address, and State Bar number, if applicable. Wis. Stat. § 809.801(12)(c).

V. Computation and Enlargement of Time—Wis. Stat. § 809.82 [§ 18.9]

Wis. Stat. § 809.82(1) adopts Wis. Stat. § 801.15(1) and (5) for computing time periods under the rules of appellate procedure. Wis. Stat. § 801.15(1) provides that, when computing the time period for an act to be done, the day of the act or event that triggers the time period is excluded from the computation. The last day of the time period is included in the computation. When the last day of the period is a day the clerk's office is closed (generally a Saturday, Sunday, or legal holiday), the time period is extended to the following workday. For example, if an appellant's brief is due on a Saturday, it need not be filed until the following Monday. Note that the clerk's office may be open on some holidays. *See, e.g.*, *Klingbeil v. Perschke*, 228 Wis. 2d 421, 596 N.W.2d 488 (Ct. App. 1999). Check with the court if in doubt.

When any time period set by law is shorter than 11 days, Saturdays, Sundays, and legal holidays are excluded from the computation. Wis. Stat. § 801.15(1)(b).

Caution. This provision applies only to circuit court proceedings; it does not apply to administrative proceedings. *See Baker v. Department of Health Servs.*, 2012 WI App 71, ¶¶ 10, 12, 342 Wis. 2d 174, 816 N.W.2d 337.

Wis. Stat. § 801.15(5)(a) provides that if a person is served by mail and is required to take some action within a prescribed period after the service of the paper or notice, three days are added to the prescribed period to compensate for possible delays by the postal service. If a person is served by fax, email, or the e-filing system under Wis. Stat. § 801.18, and the transmission is completed between 5:00 p.m. and midnight, one day is added to the prescribed period. Wis. Stat. § 801.15(5)(b). Attorneys should note that these grace periods only apply when *service* triggers a time period. Thus, for instance, because the time for filing an appellant's brief is triggered by the filing of the record, not the service of notice of the filing, the appellant does not get additional time for filing its brief. *See* Wis. Stat. § 809.19(1). On the other hand, the respondent does receive extra time in its briefing schedule because the respondent's briefing time may be triggered by service of the appellant's brief and appendix. Wis. Stat. § 809.19(3). The extensions do not apply to the filing of a notice of appeal, even if the appeal period was shortened by service of a notice of entry of judgment. *See supra* § 5.5.

Note. For e-filers, filing and service will generally be simultaneous unless the e-filer is required to traditionally serve a paper party. *See supra* § 18.3.

Wis. Stat. § 809.82(2)(a) provides that the time for performing most acts may be enlarged, reduced, or waived either on the court's own motion or upon good cause shown in a motion by a party. An important exception to this rule is found in Wis. Stat. § 809.82(2)(b), which precludes enlargement of time for all notices of appeal, except those filed under Wis. Stat. § 809.30 or 809.32 and in termination-of-parental-rights cases under Wis. Stat. § 809.107. *See supra* § 5.4. The exceptions under Wis. Stat. §§ 809.30 and 809.32 are appeals in criminal cases, including motions for postconviction and postcommitment relief, appeals in misdemeanors, and appeals in cases under Wis. Stat. § 971.17 or Wis. Stat. ch. 48, 51, 55, 938, or 980. The time for filing a motion for reconsideration under Wis. Stat. § 809.24 cannot be enlarged. Wis. Stat. § 809.82(2)(e). Presumably this is because the filing of a motion for reconsideration stays the otherwise-inviolate time for filing a civil notice of appeal. *See supra* § 5.7.

A common motion for enlargement of a time period prescribed by the rules is a motion to extend the time for filing a brief. *See supra* § 11.32. Like any other motion requesting an extension of time, a motion to extend the time for filing a brief should specify the amount of time needed and the reason it is needed. For a general discussion of motion practice, see chapter 13, *supra*.

VI. Penalties for Delay—Wis. Stat. § 809.83(1) [§ 18.10]

Wis. Stat. § 809.83(1) allows the imposition of extraordinary costs if the court finds that an appeal was taken for the purpose of delay. The costs allowed are as follows:

1. Double costs, which presumably means double those ordinarily allowed under Wis. Stat. § 809.25(1)(b), *see supra* §§ 16.3–.5;

2. A penalty in addition to interest not exceeding 10% of the judgment affirmed;

3. Damages occasioned by the delay; and

4. Reasonable attorney fees.

Wis. Stat. § 809.83(1)(a).

As is true regarding Wis. Stat. § 809.25(3), which allows costs and fees to the successful party on a frivolous appeal, *see supra* § 16.5, the court must make findings to support an award under Wis. Stat. § 809.83(1). A motion to recover such special costs must be filed no later than the filing of the respondent's (or cross-respondent's) brief. Wis. Stat. § 809.83(1)(b).

VII. Penalties for Rule Violations—Wis. Stat. § 809.83(2) [§ 18.11]

Wis. Stat. § 809.83(2)'s provision for penalties incurred for violations of the rules of appellate procedure or a court order is invoked much more frequently than is the provision for costs resulting from delay. The rule in Wis. Stat. § 809.83(2) vests the court with broad discretion. Although a rule violation other than the late filing of a notice of appeal or cross-appeal does not affect the court's jurisdiction, the violation may be grounds for dismissal of the appeal, summary reversal, striking a paper, imposition of a penalty or costs on a party or counsel, or any other action the court deems appropriate. *Id*.

Wis. Stat. § 809.83(2)'s penalty provisions are most frequently invoked for failure to timely file a document required by the rules. The court's practice in this instance is to issue a delinquency order several days after the time for filing has expired, informing the parties of the failure to file and providing notice that unless the document is filed within five days, the court may take action under Wis. Stat. § 809.83(2). Because of the provisions of Wis. Stat. § 801.15(1)(b) excluding weekends and holidays from time periods of less than 11 days, the court order effectively grants at least 7 days.

If the document is filed within the grace period, the court will accept it and generally not penalize the party on the court's own motion. However, the court can impose a penalty if it desires or if an adverse party moves for such action.

The type of penalty imposed varies with the type of violation, the individual circumstances surrounding the violation, and the appellate court's general stance toward rule violations. This last factor can be significant in the court of appeals.

If a rule violation is eventually remedied, the appellate courts are unlikely to take drastic measures, such as dismissing an appeal or granting summary reversal. For example, if a brief were filed two weeks late, the court would probably decline to dismiss the appeal or strike the brief but might impose a monetary penalty. If, on the other hand, an appellant's brief were not filed within the seven-day grace period and no motion to enlarge the briefing period were brought, the court would likely view this as a failure to prosecute and dismiss the appeal. *See, e.g.*, *In re Disciplinary Proc. Against Gramza*, 110 Wis. 2d 245, 249, 327 N.W.2d 710 (1983). Violations in the nature of technical errors that do not harm the opposing party ordinarily are not grounds for dismissing an appeal. *See B.F. v. G.D.J. (In re Termination of Parental Rts. of J.L.F.)*, 168 Wis. 2d 634, 638, 484 N.W.2d 359 (Ct. App. 1992). On the other hand, the signing of a notice of appeal by a nonparty who is not authorized to practice law has been held to render the appeal void. *See Jadair, Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 212, 562 N.W.2d 401 (1997) (affirming dismissal of appeal in situation in which nonlawyer signed notice of appeal on behalf of corporate party).

Recognizing that dismissal of an appeal for a rule violation is a drastic sanction, the supreme court has stated that dismissal is appropriate only when accompanied by a finding of egregious conduct, bad faith, or abandonment of the appeal. *See State v. Smythe*, 225 Wis. 2d 456, 469–70, 592 N.W.2d 628 (1999).

A party whose appeal is dismissed for failure to file a brief may request reconsideration. *See supra* § 16.2. If the request is made promptly after dismissal and filed with a completed brief, it will probably be granted. In such cases, however, the court may impose a monetary penalty as a condition to reopening the appeal.

Monetary penalties are often charged to the offending party's attorney rather than directly to the party. The rationale is that the attorney, not the party, failed to comply with the statutes. When the court charges a monetary penalty against an attorney, its order specifies that payment is the attorney's responsibility and that the penalty cannot be charged to the client. *See, e.g.*, *Tamminen v. Aetna Cas. & Sur. Co.*, 109 Wis. 2d 536, 563, 327 N.W.2d 55 (1982). Monetary penalties imposed under Wis. Stat. § 809.83(2) generally are made payable to the clerk of the court of appeals, not to the adverse party. In at least one case, the court found the

attorney's rule violations (misrepresentation of facts in a brief) to be so egregious that it ordered him to pay the other party's attorney fees and costs. *See Settipalli v. Settipalli*, 2005 WI App 8, ¶ 28, 278 Wis. 2d 339, 692 N.W.2d 279.

An attorney's pattern of rule violations or unreasonable requests for extensions may be grounds for a penalty against the attorney or even a referral to the Office of Lawyer Regulation (formerly the Board of Attorneys Professional Responsibility). *See State v. Smythe*, 225 Wis. 2d 456, 472, 592 N.W.2d 628 (1999). It is not appropriate, however, to penalize the *appellant* by dismissing the appeal when the primary reason for dismissal is the attorney's course of conduct in other cases. *Id.* at 469–70.

Delinquent respondents' briefs present a difficult problem because appellate courts are extremely reluctant to reverse a circuit court simply because of a party's failure to participate on appeal. To ensure that summary reversal for a rule violation is not lightly ordered, the court must find that the circumstances surrounding the rule violation constitute egregious conduct, bad faith, or an abandonment of the appeal. *Raz v. Brown*, 2003 WI 29, ¶ 3, 260 Wis. 2d 614, 660 N.W.2d 647.

VIII. When Rules of Civil Procedure Apply [§ 18.12]

Wis. Stat. § 809.84 states that when a matter in an appeal to the court of appeals or supreme court is not covered by the rules of appellate procedure, the rules of civil procedure apply, unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result. This rule was enacted as a precautionary measure. Although the rules of appellate procedure are designed to cover all aspects of taking an appeal to the court of appeals or the supreme court, if some detail of practice escapes coverage by the appellate rules, Wis. Stat. § 809.84 incorporates by reference the rules of civil procedure.

Wis. Stat. § 809.84 has been little used. When it has been used, the results have not been startling. For example, the supreme court adopted the definition of "judgment" set forth in the rules of civil procedure in the absence of a definition in Wis. Stat. ch. 809. *Archdiocese of Milwaukee v. City of Milwaukee*, 91 Wis. 2d 625, 626, 284 N.W.2d 29 (1979). Similarly, although Wis. Stat. ch. 809 does not state explicitly that a notice of appeal must be signed, the rules of civil procedure do require that all documents filed with a court be signed; therefore, a notice of appeal must be signed. *See Jadair, Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 200, 562 N.W.2d 401 (1997) (citing Wis. Stat. §§ 809.84, 801.14, 802.01(2)(d)). *But see State v. Seay*, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437 (holding that failure to sign notice of appeal may be remediable error).

IX. Duties of Appellate Counsel [§ 18.13]

Wis. Stat. § 809.85(1) states a general rule that counsel appointed in a lower court (e.g., adversary counsel or a guardian ad litem) has a duty to continue to act as counsel until relieved of that duty by the court. The rule specifies that appointed counsel may also withdraw if originally retained for a limited scope of representation, if replaced by substitute counsel, or upon consent of the client. *See* Wis. Stat. § 809.85(3), (4), (5)(b). Appointed counsel may also seek withdrawal without consent of the party by motion to withdraw. Wis. Stat. § 809.85(5)(c). The contents of a motion to withdraw are specified in Wis. Stat. § 809.85(5)(e), and factors the court may consider in deciding a motion to withdraw are enumerated in Wis. Stat. § 809.85(5)(f). Withdrawing counsel must surrender the client's file within 14 days after a request by the client or successor counsel unless the court orders otherwise. Wis. Stat. § 809.85(6).

Guardians ad litem are expected to file a statement on their clients' interests. *See Marotz v. Marotz*, 80 Wis. 2d 477, 488, 259 N.W.2d 524 (1977). That statement may be in the form of either a brief or a statement why no brief will be filed. Wis. Stat. § 809.19(6m); *see also supra* § 11.28. These statements need not be lengthy—one or two pages often are sufficient—and must be filed within 20 days after the filing of the appellant's brief. Wis. Stat. § 809.19(6m).

Appointed counsel must continue to act for the client until the decision whether to appeal is made and until appellate counsel is appointed or retained. *See Whitmore v. State*, 56 Wis. 2d 706, 719, 203 N.W.2d 56 (1973). The rules governing appeals in criminal cases go into this continuing duty in detail. *See infra* ch. 19.

Whether appointed or privately retained, counsel representing a person in a termination-of-parental-rights dispositional proceeding under Wis. Stat. § 48.427 must continue representation through the filing of a notice of intent to seek postdisposition relief, unless sooner discharged by the client or by court order. Wis. Stat. § 809.107(2)(am).

Whether appointed or privately retained, an attorney is not entitled to withdraw until the client has been given notice and an opportunity to obtain substitute counsel. SCR 20:1.16(d); *see also Sherman v. Heiser*, 85 Wis. 2d 246, 251, 270 N.W.2d 397 (1978). Motions to withdraw as appellate counsel should recite that the attorney has notified the client of the decision to withdraw and advised the client to obtain substitute counsel. If the client consents to a withdrawal, it is advisable for the motion to include a signed statement of consent by the client. If the withdrawal is not with consent, the motion should state the reasons for the withdrawal. *See* SCR 20:1.16 (criteria for mandatory and permissive withdrawal). Motions for substitution of counsel also should be supported by the signed consent of the client. SCR 11.02(3).

An attorney who files a notice of appeal on behalf of a client should, in most cases, prosecute the appeal from beginning to end. The court looks with disfavor on motions to withdraw filed after an appeal is taken, unless the withdrawal is with consent.

Wis. Stat. § 809.85(2) provides that attorneys not licensed in Wisconsin may appear in an appeal pro hac vice (1) if they have already been admitted in the circuit court case, by providing the appellate court clerk with a copy of the circuit court order of admission; or (2) by motion filed in the appellate court. As always in such cases, co-counsel admitted in Wisconsin must sign all documents filed in the court and be personally present in all proceedings unless excused by the court. Wis. Stat. § 809.85(2)(a), (b).

Supplement Chapter 19
Review in Criminal Cases and Postdisposition Relief Under Wis. Stat. § 809.30

Book sections supplemented: 19.1 and 19.11

19.1 Scope

Page 2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023; and all references to form numbers are to mandatory Wisconsin circuit court forms, as updated through Sept. 14, 2023.

Page 4: Amended textual sentence and cross-references at end of Note *in section*

Note. Electronic filing (e-filing) in the circuit courts is mandatory for most parties (except nonrepresented parties and low-volume filing agents) in all Wisconsin counties. *See* Wis. Stat. § 801.18. Thus, documents that must be filed in the circuit court as part of the appellate process (e.g., notice of intent to pursue postconviction or postdisposition relief, the docketing statement, and the statement on transcript) must be e-filed. E-filing also is mandatory in the appellate courts. *See supra* § 18.3; *infra* ch. 22.

19.11 [Mechanics of Postconviction or Postdisposition Relief] [Steps in Postconviction or Postdisposition Relief Process] Appointing Counsel and Requesting Transcripts and Case Record

Page 11: Replaced last paragraph in section

The verbatim record of in-court proceedings, created as authorized under SCR 71.01(3), must be retained for 10 years before it can be destroyed. SCR 72.01(47). If the transcripts have not been ordered and the court reporter's notes (or voice recordings or digital audio recordings) have been destroyed, a defendant faces an almost insuperable obstacle to postconviction relief. See *State v. Pope*, 2019 WI 106, 389 Wis. 2d 390, 936 N.W.2d 606, in which the absence of a transcript and notes, resulting from the failure of trial counsel to file a notice of intent to pursue postconviction relief 20 years earlier, was deemed to bar relief. By itself, the absence

of a transcript creates no presumption of prejudicial error. *Id.* ¶ 3. This is true even if the transcript had been ordered and filed but was destroyed in the routine culling of court records after 10 years; this destruction through no fault of the defendant does not relieve the defendant of the burden in a collateral attack. *See State v. Clark*, 2022 WI 21, ¶¶ 20–21, 401 Wis. 2d 344, 972 N.W.2d 533.

Chapter 19
Review in Criminal Cases and Postdisposition Relief Under Wis. Stat. § 809.30

I. Scope
[§ 19.1]

This chapter begins by describing the time and mechanics for obtaining postconviction or postdisposition relief under Wis. Stat. § 809.30. [1]

Postconviction motions for relief under Wis. Stat. §§ 973.19 and 974.06 are also discussed. In addition, this chapter outlines the rules governing appeals by the state and bail pending appeal or other postconviction relief. No-merit reports and no-merit petitions for review are briefly discussed as well. This chapter does not extensively discuss provisions for postconviction motions or petitions to modify conditions of extended supervision under Wis. Stat. § 302.113(7m); to modify a bifurcated sentence under Wis. Stat. § 302.113(9g) for an inmate with extraordinary health circumstances; to adjust a bifurcated sentence under Wis. Stat. § 973.195; to adjust a sentence under Wis. Stat. § 973.198 (positive adjustment time); or to request DNA testing pursuant to Wis. Stat. § 974.07. *See* Wis. Stat. § 809.30(1)(c) (defining *postconviction relief*). Harmless error is addressed in section 3.22, *supra*.

The discussions of state's appeals, habeas corpus, and motions under Wis. Stat. § 974.06 are not intended to be exhaustive. Because these topics, particularly habeas corpus and Wis. Stat. § 974.06 motions, are complicated and generally within the realm of criminal-law experts, this chapter seeks only to alert attorneys to the main precepts of these procedures.

This chapter is primarily concerned with Wis. Stat. §§ 809.30–809.32. Although generally applicable to criminal matters (felonies and misdemeanors), these rules also apply to cases arising under Wis. Stat. ch. 48 (Children's Code, *see* Wis. Stat. § 48.465) (except for cases under Wis. Stat. §§ 48.375(7) (parental consent to abortion), 48.43 (termination of parental rights), and 48.9795 (guardianship proceedings), *see infra* § 20.3), Wis. Stat. ch. 51 (Mental Health Act), Wis. Stat. ch. 55 (protective placement and services), and Wis. Stat. ch. 938 (Juvenile Justice Code, *see* Wis. Stat. § 938.47) and to commitments under Wis. Stat. § 971.17 (defendants found not guilty by reason of mental disease or defect) and Wis. Stat. ch. 980 (sexually violent persons, *see* Wis. Stat. § 980.038(4)). *See* Wis. Stat. § 808.04(3). Certain other cases are appealable under Wis. Stat. § 809.30 pursuant to specific statutory authority. *See, e.g.*, Wis. Stat. §§ 973.155(6) (sentence credits), 785.03(3) (contempt prosecuted by state). Consequently, readers should be aware that, although the appeal procedures discussed in this chapter are labeled criminal procedures, they may encompass other types of cases as well.

The definitions in Wis. Stat. § 809.30(1) make clear the applicability of the Wis. Stat. § 809.30 rules to certain civil proceedings. For example, rather than referring to a defendant, the statute refers to a *person*, who is defined as one seeking relief in a criminal case or in cases under Wis. Stat. § 971.17 or Wis. Stat. ch. 48, 51, 55, 938, or 980. *See* Wis. Stat. § 809.30(1)(b). And, instead of referring solely to *postconviction relief*, the rule provides a separate definition for *postdisposition relief*, which includes noncriminal appeals. *See* Wis. Stat. § 809.30(1)(c), (d).

Note. Electronic filing (e-filing) in the circuit courts is mandatory for most parties (except nonrepresented parties and low-volume filing agents) in all Wisconsin counties. *See* Wis. Stat. § 801.18. Thus, documents that must be filed in the circuit court as part of the appellate process (e.g., notice of intent to pursue postconviction or postdisposition relief, the docketing statement, and the statement on transcript) must be e-filed. E-filing also is mandatory in the court of appeals, but is being phased in by the supreme court. *See supra* § 18.3; *infra* chs. 22, 23.

II. Mechanics of Postconviction or Postdisposition Relief [§ 19.2]

A. In General [§ 19.3]

The process of seeking review in the court of appeals under Wis. Stat. § 809.30 begins at the time of sentencing in a criminal case, *see* Wis. Stat. § 809.30(1)(f), or at the time of a final adjudication in a proceeding under Wis. Stat. § 971.17 or a case under Wis. Stat. ch. 48, 51, 55, 938, or 980, *see* Wis. Stat. § 809.30(1)(a). *See infra* § 19.5. Once the applicable triggering event has occurred, a person must decide whether to pursue an appeal or whether to seek postconviction or postdisposition relief in the circuit court. Wis. Stat. § 809.30 outlines the steps a person must take in following either of these courses of action.

A motion under Wis. Stat. § 809.30(2)(h) for postconviction or postdisposition relief in the circuit court may be filed as an alternative to or as a prelude to the filing of a notice of appeal. Postconviction and postdisposition motions under Wis. Stat. § 809.30, and the reasons for filing such motions rather than an appeal, are discussed in section 19.16, *infra*. For a good, brief description of the basic postconviction review options, including appeal and postconviction motions under Wis. Stat. §§ 809.30(2) and 974.06, see *State v. Evans*, 2004 WI 84, ¶¶ 27–34, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 29, 290 Wis. 2d 352, 714 N.W.2d 900.

B. Notice of Right to Seek Postconviction Relief—Wis. Stat. § 973.18 and Form CR-233 [§ 19.4]

Wis. Stat. § 973.18 requires that the circuit court ensure that a criminal defendant be informed of the right to seek postconviction relief. To comply with this statutory requirement, Wisconsin circuit courts use a mandatory form (Form CR-233—Notice of Right to Seek Postconviction Relief), which the defendant and the defendant's trial counsel must review, sign, and file with the court at the conclusion of sentencing. Form CR-233 advises the defendant of the right to seek postconviction relief and of the requirement to inform the defendant's trial counsel, within 20 days after sentencing, of the defendant's decision to pursue postconviction relief. Once informed within that period, trial counsel can then comply with the duty (under Wis. Stat. § 973.18(5)) to file the notice of intent to seek postconviction relief to commence the postconviction process, including the appointment of appellate counsel if the defendant is indigent.

Note. Although Wis. Stat. § 973.18 requires the circuit court "personally" to advise the defendant of the right to seek postconviction relief, the Wisconsin State Public Defender's Office takes the position that an oral recitation is unnecessary so long as the court ascertains that the defendant and counsel have completed and filed Form CR-233.

C. Appeal; Postconviction or Postdisposition Motion—Wis. Stat. § 809.30 [§ 19.5]

Review under Wis. Stat. § 809.30 is like a civil appeal in that orders and judgments in Wis. Stat. § 809.30 cases are appealable as of right only when they are final within the meaning of Wis. Stat. § 808.03(1). *See State v. Rabe*, 96 Wis. 2d 48, 57, 291 N.W.2d 809 (1980); *see also supra* §§ 4.2–.20. The right to review is triggered in criminal cases by the finality of sentencing, which is defined in Wis. Stat. § 809.30(1)(f) as imposition of a sentence, fine, or probation. For sexually violent person commitments, the relevant triggering event is the entry of an order for commitment under Wis. Stat. § 980.06. In all other Wis. Stat. § 809.30 cases, the right is triggered by a final adjudication, which is defined by Wis. Stat. § 809.30(1)(a) as the entry of a final order or judgment.

As in a civil case, a nonfinal order in Wis. Stat. § 809.30 cases may be appealed with permission of the court of appeals. Wis. Stat. § 808.03(2); *see also supra* ch. 9. There is, however, a general policy against interrupting criminal proceedings for the purpose of interlocutory review. *Rabe*, 96 Wis. 2d at 59. Errors alleged to have occurred at a preliminary hearing must first be raised in the circuit court before trial, and they are deemed waived if they are not raised by filing a petition for leave to appeal under Wis. Stat. § 809.50. *See State v. Webb*, 160 Wis. 2d 622, 628, 636, 467 N.W.2d 108 (1991); *see also State v. Wolverton*, 193 Wis. 2d 234, 254–55, 533 N.W.2d 167 (1995). If the court of appeals denies the petition, the issue is preserved and may be raised again on a subsequent appeal as of right. *Wolverton*, 193 Wis. 2d at 254.

In a few special types of cases, including parole decisions and probation revocation proceedings, orders may be reviewed by certiorari. *State v. Bridges*, 195 Wis. 2d 254, 258, 536 N.W.2d 153 (Ct. App. 1995); *see also infra* § 28.27.

Review as of right under Wis. Stat. § 809.30 is commenced differently than a civil appeal as of right. Although Wis. Stat. § 809.30 still requires the filing of a notice of appeal before an appeal may be taken, such filing does not occur until a number of other procedural steps have been taken to pave the way for review.

For several reasons, Wis. Stat. § 809.30 review is handled differently than civil appeals. Both the defendant (person) and the state often are represented by a different attorney on appeal than at trial. Because new counsel often are involved, it is usual for the parties to insist on a full transcript of the circuit court proceedings to review before deciding whether to appeal. It takes time to produce the transcripts and to review them. A complicating factor, also adding delay to the Wis. Stat. § 809.30 appellate process, is that the defendant (person) may be indigent, thus requiring a redetermination of indigency before publicly compensated appellate counsel may be appointed.

The rules for Wis. Stat. § 809.30 review are designed to accommodate these considerations while still providing a practical timetable to keep things moving.

D. Steps in Postconviction or Postdisposition Relief Process [§ 19.6]

1. In General [§ 19.7]

Wis. Stat. § 809.30(1)(c) defines *postconviction relief* as an appeal or motion for postconviction relief in a criminal case other than an appeal, motion, or petition under Wis. Stat. § 302.113(7m) or (9g), 973.19, 973.195, 973.198, 974.06, or 974.07(2); in a sexually violent person commitment, postconviction relief means an appeal or a motion for postcommitment relief under Wis. Stat. § 980.038(4). Wis. Stat. § 809.30(1)(d) addresses the noncriminal cases included under Wis. Stat. § 809.30 and defines *postdisposition relief* as an appeal or motion for postdisposition relief from a final adjudication in the circuit court. If a person decides to seek relief, a series of steps must be taken under Wis. Stat. § 809.30. These steps are outlined below.

2. Filing and Serving Notice of Intent [§ 19.8]

Within 20 days after sentencing, *see* Wis. Stat. § 809.30(1)(f), or final adjudication, *see* Wis. Stat. § 809.30(1)(a), a person who wishes to seek postconviction or postdisposition relief must file in the circuit court and serve on the prosecutor and any other party a notice of intent to pursue postconviction or postdisposition relief. Wis. Stat. § 809.30(2)(b); *see also infra* app. E (form notice). The 20-day time period may be extended by motion to the court of appeals. *See infra* § 19.30. The attorney who represented the person at sentencing or the final adjudication must continue the representation by filing this notice, if postconviction or postdisposition relief is desired, unless the person has already discharged the attorney or unless the circuit court has allowed the attorney to withdraw before the notice must be filed. Wis. Stat. § 809.30(2)(a). This requirement ensures that the person will have the assistance of trial counsel to commence the appellate process.

As in civil appeals, *see* Wis. Stat. § 808.04(8), the rules governing postconviction and postdisposition relief treat a prematurely filed notice of intent as timely if the record discloses that the sentencing or final adjudication occurred after the notice was filed. Wis. Stat. § 809.30(2)(b).

Caveat. Litigants should be aware that, consistent with the inclusion of probation in the definition of sentencing, an order of probation triggers the 20-day period for filing a notice of intent—even if probation is later revoked and a sentence imposed. *State v. Tobey*, 200 Wis. 2d 781, 548 N.W.2d 95 (Ct. App. 1996). Any subsequent appeal would be limited to issues first raised at the postrevocation sentencing. *State v. Scaccio*, 2000 WI App 265, ¶¶ 1, 10, 240 Wis. 2d 95, 622 N.W.2d 449.

Wis. Stat. § 809.30(2)(b) sets forth the elements that a notice of intent to pursue postconviction or postdisposition relief must include:

1. The case name and number;

2. An identification of the judgment or order from which the person intends to seek postconviction or postdisposition relief and the date it was entered;

3. The name and address of the person and the person's trial counsel;

4. Whether the person's trial counsel was appointed by the state public defender and, if so, whether the person's financial circumstances have materially improved since the date the person's indigency was determined;

5. Whether the person requests the state public defender to appoint counsel for purposes of postconviction or postdisposition relief; and

6. Whether a person who does not request the state public defender to appoint counsel will represent himself or herself or will be represented by retained counsel. If the person will be represented by retained counsel to pursue postconviction or postdisposition relief, counsel's name and address must be included.

The requirements of the notice provide both basic and more particularized information. The basic information identifies the person seeking relief, the trial counsel, and the case number and describes the judgment or order from which appeal is sought. The more particularized information is primarily concerned with how the person will be represented on appeal. Thus, the notice seeks to identify cases that must be referred to the state public defender and cases that may require a redetermination of indigency.

Filing of the notice of intent to pursue postconviction or postdisposition relief is required to commence the direct appeal process under Wis. Stat. § 809.30 and triggers appointment of counsel by the state public defender for indigent defendants.

3. Action by Clerk of Circuit Court [§ 19.9]

The second step in the appeal process under Wis. Stat. § 809.30 requires the clerk of circuit court to take certain actions within five days after the filing of a notice of intent to pursue postconviction or postdisposition relief. Wis. Stat. § 809.30(2)(c). The nature of these steps depends on the need for counsel on appeal. If the person filing the notice of intent requests that the state public defender provide postconviction or postdisposition representation, the clerk must send the following items to the state public defender's appellate intake office:

1. A copy of the notice of intent to pursue postconviction or postdisposition relief, which shows the date on which the notice was filed or entered;

2. A copy of the judgment or order specified in the notice, which shows the date on which the judgment or order was filed or entered;

3. A list of the court reporters responsible for the transcripts of each proceeding in the underlying action; and

4. A list of those proceedings in which a transcript has been filed with the clerk of circuit court.

Wis. Stat. § 809.30(2)(c)1. If the person does not seek public defender representation, the clerk sends these items to the person who filed the notice, if the person is self-represented, or to the person's privately retained counsel. Wis. Stat. § 809.30(2)(c)2.

The requirement that the clerk of circuit court supply a list of the court reporters involved in a given case is important because it ensures that the reporters are identified early in the appellate process. Keeping track of the court reporters can be difficult even if trial counsel also acts as appeal counsel.

4. Indigency Determinations for Appointment of Counsel [§ 19.10]

If a person who was represented at trial by appointed counsel requests public defender representation in the notice of intent to pursue postconviction or postdisposition relief, the prosecutor may, within five days after service and filing of the notice, file with the circuit court and serve on the public defender a request that indigency be redetermined before counsel is appointed or transcripts are requested. This does not apply to a child entitled to representation under Wis. Stat. § 48.23 or 938.23 or to a person entitled to representation under Wis. Stat. § 51.60(1), 55.105, or 980.03(2)(a). Wis. Stat. § 809.30(2)(d). Upon receiving such a request, the public defender must make a redetermination of indigency. In addition, the public defender must make a determination of indigency for persons who were not previously appointed counsel at the trial level. Wis. Stat. § 809.30(2)(e).

5. Appointing Counsel and Requesting Transcripts and Case Record [§ 19.11]

The next step in the Wis. Stat. § 809.30 appeal process is the appointment of counsel, if necessary, and the requesting of the transcripts. If appointment of counsel has been requested in the notice of intent to pursue postconviction or postdisposition relief and no determination or redetermination of indigency is necessary, the state public defender must appoint counsel and request the transcripts within 30 days after the state public defender appellate intake office has received the materials sent by the clerk of circuit court under Wis. Stat. § 809.30(2)(c). *See supra* § 19.9. When a determination or redetermination of indigency is first necessary, *see supra* § 19.10, counsel must be appointed and the transcripts and the circuit court case record must be requested within 50 days after the state public defender appellate intake office receives the materials sent by the clerk of circuit court under Wis. Stat. § 809.30(2)(c). Wis. Stat. § 809.30(2)(e).

If an appeal is taken by the state, a representative of the public, any other party, or persons entitled to appeal under certain sections of Wis. Stat. ch. 51 or 55, and the person who is the subject of the appeal is a child or claims to be indigent, the court must refer the person to the state public defender for a determination of indigency and the appointment of counsel. Wis. Stat. § 809.30(3). When the state public defender appoints counsel for an indigent person's appeal, that agency is responsible for the costs of both the original transcripts and the copy to be used by counsel. Wis. Stat. § 967.06(3); *see also* Wis. Stat. § 814.69(1)(a) (listing transcript fees).

Special provisions for obtaining copies of transcripts and court records in Wis. Stat. ch. 48 or 938 proceedings are set forth in Wis. Stat. § 809.30(2)(fm).

The rules in Wis. Stat. § 809.30 do not address how a person will be represented if he or she is not found indigent by the public defender and if there is no applicable exception to the indigency requirement under Wis. Stat. § 809.30(2)(d). *See supra* § 19.10. The person may represent himself or herself, proceed with privately retained counsel, or seek court-appointed counsel on indigency grounds.

If the person's notice of intent to pursue postconviction or postdisposition relief does not request public defender representation, the person must request a transcript of the court reporter's verbatim record and may request a copy of the circuit court case record within 30 days after filing the notice. Wis. Stat. § 809.30(2)(f). A person who has been denied representation must take such action within 90 days after filing a notice of intent to pursue postconviction or postdisposition relief. *Id*. It is usual to delay requesting copies of the transcript for adverse parties until after the filing of a notice of appeal or motion for postconviction or postdisposition relief. *See infra* § 19.15.

The verbatim record of in-court proceedings, created as authorized under SCR 71.01(3), must be retained for 10 years before it can be destroyed. SCR 72.01(47). If the transcripts have not been ordered and the court reporter's notes (or voice recordings or digital audio recordings) have been destroyed, a defendant faces an almost insuperable obstacle to postconviction relief. See *State v. Pope*, 2019 WI 106, 389 Wis. 2d 390, 936 N.W.2d 606, *cert. denied*, 141 S. Ct. 272 (2020), in which the absence of a transcript and notes, resulting from the failure of trial counsel to file a notice of intent to pursue postconviction relief 20 years earlier, was deemed to bar relief. By itself, the absence of a transcript creates no presumption of prejudicial error. *Id.* ¶ 3.

6. Filing and Serving Transcript and Case Record [§ 19.12]

The clerk of circuit court must serve a copy of the circuit court case record on the person in a Wis. Stat. § 809.30 case within 60 days after receiving the request for the circuit court case record. Wis. Stat. § 809.30(2)(g)1.; *see supra* § 19.11.

Within 60 days after the request for the transcript, the court reporter must file it with the circuit court and serve a copy on the person. Wis. Stat. § 809.30(2)(g)2. Transcripts of postconviction or postdisposition proceedings must be filed and served within 20 days after a request. *Id.* The electronically filed transcript constitutes the official record, and service of the transcript occurs when access is granted. Wis. Stat. § 801.18(9)(a), (15)(b). Access is granted to users identified by the court reporter. Wis. Stat. § 801.18(3), (15).

As in a civil case, the responsibility for filing the transcripts in a Wis. Stat. § 809.30 case lies solely with the court reporter. Motions by a court reporter to extend the time for filing a transcript pursuant to Wis. Stat. § 809.11(7)(c) must be supported by good cause. The court of appeals may sanction an overdue court reporter as provided in Wis. Stat. § 809.11(7)(d) until the overdue transcript is filed. *See supra* § 7.2.

III. Filing Notice of Appeal or Motion for Postconviction or Postdisposition Relief [§ 19.13]

A. In General [§ 19.14]

The filing and service of the trial transcripts and circuit court case record trigger the next step in the Wis. Stat. § 809.30 appeal process. Within 60 days after the later of service of the trial transcripts or service of the circuit court record, a person wishing to go forward with review must file either a notice of appeal or a motion seeking postconviction or postdisposition relief and serve it on the prosecutor and any other party. Wis. Stat. § 809.30(2)(h). This 60-day period allows postconviction or postdisposition counsel, or the person who filed a notice of intent, to review the transcripts and the circuit court record and decide whether to actually seek postconviction or postdisposition relief. (Note that because the period is timed from the date of service of the last transcript or the circuit court record, a tardy court reporter or clerk of circuit court can delay the entire appellate process.) The rule specifically prohibits a person from filing a notice of motion for hearing at the same time the motion for postconviction or postdisposition relief is filed. *Id.*

A person must file a postconviction or postdisposition motion as a precursor of an appeal, unless the only issues to be raised were previously raised in the circuit court or address sufficiency of the evidence. *Id.*

In termination-of-parental-rights cases, the notice of appeal and a docketing statement must be filed within 30 days after the later of service of the transcript or service of the circuit court case record, unless extended under Wis. Stat. § 809.82. Wis. Stat. § 809.107(5). The shortened appeal period in termination-of-parental-rights cases has been found to be constitutional. *See Rhonda R.D. v. Franklin R.D. (In the Int. of Christopher D.)*, 191 Wis. 2d 680, 694–99, 530 N.W.2d 34 (Ct. App. 1995). If, after serving a notice of intent and ordering the transcript and record, a person decides not to file a notice of appeal in a termination-of-parental-rights case within the 30-day period, that person must give notice of abandonment of the appeal pursuant to Wis. Stat. § 809.107(5)(am).

B. Notice of Appeal [§ 19.15]

The general procedures for initiating an appeal, *see supra* § 5.9, apply to Wis. Stat. § 809.30 cases that have reached the appeal stage. In addition to the general requirements for case name and number, identification of judgment or order appealed from, etc., the notice of appeal in a Wis. Stat. § 809.30 case must provide the date of the service of the last transcript or copy of the record, if no postconviction or postdisposition motion is filed; the date of the order deciding postconviction or postdisposition motions; or the date of any other notice-of-appeal deadline set by the court of appeals. Wis. Stat. § 809.10(1)(b)5.

The notice of appeal generally must be served and filed in the same manner as in a civil appeal. *See* Wis. Stat. § 809.30(2)(h), (j). Therefore, the notice must be filed in the circuit court, *see id.*, and, unless the appellant is indigent, the $195 filing fee must be paid, *see* Wis. Stat. § 809.25(2)(a)1. In addition, the notice of appeal in a Wis. Stat. § 809.30 case must be served on the prosecutor and any other party. Wis. Stat. § 809.30(2)(h), (j).

The three-strikes provision of the Prisoner Litigation Reform Act, 1997 Wis. Act 133, providing that an action commenced by a prisoner seeking leave to proceed without prepayment of fees must be dismissed if that prisoner has had three or more actions previously dismissed, does *not* apply to appeals. *State ex rel. Adell v. Smith*, 2000 WI App 188, ¶ 8, 238 Wis. 2d 655, 618 N.W.2d 208 (construing Wis. Stat. § 801.02(7)(d)).

All proceedings after the filing of the notice of appeal, except for filing the record, are governed by the rules of appellate procedure governing civil appeals. Wis. Stat. § 809.30(2)(k). The appellant therefore must file a statement on transcript within 14 days after filing the notice of appeal. Wis. Stat. § 809.11(4). Unless appellate counsel brings a postconviction or postdisposition motion in the circuit court, this should be nothing more than a formality in a Wis. Stat. § 809.30 appeal, in contrast to a civil appeal, because presumably all the transcripts will have been prepared in advance of filing the notice of appeal.

Although new transcripts might not be necessary, copies must be requested for opposing counsel. Accordingly, the appellant's statement on transcript should indicate that the court reporters have been contacted and are preparing copies for opposing counsel. In the case of an indigent person for whom counsel has been appointed through the state public defender's office for the postconviction or postdisposition proceedings, the additional copies of the transcripts for opposing counsel (like the original and the copy for the public defender) are paid for by the state public defender. Wis. Stat. § 967.06(3).

In serving the transcripts (and other documents), care must be taken to correctly identify opposing counsel. For example, regardless of whether a case involves a felony or a misdemeanor, the district attorney is considered to be opposing counsel for the purposes of postconviction proceedings in the circuit court. In the appellate courts, however, Wis. Stat. § 809.802 makes clear that the attorney general represents the state in all felony proceedings absent special authorization for the district attorney. The district attorney represents the state in all one-judge misdemeanor appeals in the court of appeals, but even in those cases, the attorney general acts for the state in subsequent proceedings before the supreme court.

No more than 40 days after the filing of the notice of appeal, the record must be filed, unless the time period is extended by a motion for relief pending appeal, by a motion to correct or supplement the record, or by court order. Wis. Stat. § 809.30(2)(k). Upon the filing of the record, the briefing schedule of Wis. Stat. § 809.19 commences as it would in a civil appeal. *Id.*

C. Postconviction or Postdisposition Motions Under Wis. Stat. § 809.30 [§ 19.16]

Wis. Stat. § 809.30(2)(h) provides that instead of, or as a prelude to, filing a notice of appeal (see section 19.15, *supra*, regarding appeals), a person may file a motion for postconviction or postdisposition relief in the circuit court. The motion must be filed within the same period allowed for filing a notice of appeal (i.e., within 60 days after the later of service of the transcript or service of the circuit court case record). Wis. Stat. § 809.30(2)(h). (The steps in the process leading to the filing and service of the transcript and the circuit court case record are described in sections 19.2–.12, *supra*.)

Postconviction or postdisposition motions under Wis. Stat. § 809.30 do not include motions to modify sentence under Wis. Stat. § 973.19; motions for postconviction relief under Wis. Stat. § 974.06; petitions to modify conditions of extended supervision under Wis. Stat. § 302.113(7m); petitions to modify a bifurcated sentence for an inmate with extraordinary health circumstances under Wis. Stat. § 302.113(9g); petitions to adjust a bifurcated sentence under Wis. Stat. § 973.195; petitions to adjust a sentence under Wis. Stat. § 973.198 (positive adjustment time); or postconviction motions for DNA testing of evidence under Wis. Stat. § 974.07(2). Wis. Stat. § 809.30(1)(c). Motions under Wis. Stat. §§ 973.19 and 974.06 are discussed in sections 19.17 and 19.25, *infra*.

Postconviction or postdisposition motions do not need to be filed before an appeal if the issues concern sufficiency of the evidence or were previously raised in the circuit court. Wis. Stat. §§ 809.30(2)(h), 974.02(2).

Therefore, if appellate counsel concludes that the only issues to be raised on appeal are points that have previously been raised and rejected (for example, in a motion to dismiss; a motion for mistrial; or a request for, or objection to, a jury instruction), no postconviction or postdisposition motion need be filed. On the other hand, new issues such as newly discovered evidence, a challenge to the sentence, or an assertion that trial counsel was ineffective must be the subject of a postconviction or postdisposition motion before the appeal. Although a postconviction motion ordinarily is a prerequisite to appealing from a challenge to a sentence, a direct appeal may be allowed if "compelling circumstances" justify overriding this requirement. *See State v. Walker*, 2006 WI 82, ¶ 31, 292 Wis. 2d 326, 716 N.W.2d 498.

The postconviction or postdisposition motions procedure outlined in Wis. Stat. § 809.30 provides an opportunity to present issues to the circuit court that were not previously raised.

Practice Tip. Additionally, appellate counsel may, as a matter of strategy, sometimes use the procedure to present issues that *were* previously raised in the circuit court. A crucial ruling made in the midst of trial without the benefit of time for research and reflection may well be viewed differently by the circuit court in the context of a postconviction or postdisposition motion setting forth the applicable law and demonstrating the prejudice caused by the prior decision. Moreover, circuit court judges are sometimes more inclined than appellate judges to reverse a circuit court ruling.

The provision for postconviction or postdisposition motions is not intended to eliminate traditional concepts of waiver. Thus, if a challenge to trial proceedings should have been made before the conviction or final adjudication, the provision for a postconviction or postdisposition motion does not provide a substitute for a timely objection. On the other hand, even in the absence of a timely challenge, parties may pursue issues by a postconviction or postdisposition motion or on appeal, either under the plain-error doctrine, *see, e.g.*, *Virgil v. State*, 84 Wis. 2d 166, 267 N.W.2d 852 (1978), or in the interest of justice, *see, e.g.*, *State v. Weiss*, 2008 WI App 72, ¶¶ 16–17, 312 Wis. 2d 382, 752 N.W.2d 372.

If a motion for postconviction or postdisposition relief is filed instead of a notice of appeal, the circuit court must decide the motion by an order within 60 days after the filing of the motion; otherwise, the motion is deemed denied, and the circuit court clerk will immediately enter an order denying the motion. Wis. Stat. § 809.30(2)(i). This procedure for automatic denial is designed to eliminate the possibility of the circuit court delaying an appeal by failing to decide a postconviction or postdisposition motion. *State v. Deer*, 125 Wis. 2d 357, 368, 372 N.W.2d 176 (Ct. App. 1985).

The requirement that the circuit court decide a motion for postconviction or postdisposition relief within 60 days is often impossible to meet, particularly if the motion requires an evidentiary hearing. A party or the circuit court may move for an extension of the time required for the circuit court to decide the motion. Wis. Stat. § 809.30(2)(i). This motion must be filed in the court of appeals, which has authority under Wis. Stat. § 809.82(2) to extend the time periods of any of the rules of appellate procedure. In some cases, the circuit court will advise the parties of its inability to meet the 60-day deadline and will request the moving party to move for an extension.

The motion for extension should recite the reason additional time is needed (e.g., a hearing is necessary, or the circuit court has requested additional time to issue a decision). Because the court of appeals does not grant open-ended motions, the motion should request a specific amount of time.

The circuit court loses competency to decide a postconviction or postdisposition motion when the 60-day time limit expires without a decision. *State v. Scherreiks*, 153 Wis. 2d 510, 516, 451 N.W.2d 759 (Ct. App. 1989). If the circuit court grants relief after the expiration of the time limit, the court of appeals may, however, grant the same relief pursuant to its discretionary power of reversal. *Id.* at 516–17. The court of appeals also has authority to extend the 60-day deadline, *see infra* § 19.30, and in practice has done so after it has expired.

As required for any appealable order, the disposition of the postconviction or postdisposition motion must be reduced to writing and state that it is final for purposes of appeal to confer appellate jurisdiction over the decision. If a postconviction or postdisposition motion is denied, an appeal is commenced by filing a notice of appeal in the circuit court within 20 days after entry of the written order. Wis. Stat. § 809.30(2)(j). The notice should specify that the appeal is taken from both the order denying relief and the underlying judgment. In *State v. Malone*, 136 Wis. 2d 250, 401 N.W.2d 563 (1987), the court held that it had no jurisdiction to review a claim based on ineffective assistance of counsel raised in the postconviction motion when the appeal was taken only from the judgment of conviction. Once the clerk receives the notice of appeal after entry of a written order denying a postconviction or postdisposition motion, the appeal proceeds like any other appeal. *See supra* § 19.15.

If the appeal is from the denial of a postconviction or postdisposition motion under Wis. Stat. § 809.30, as well as from the judgment, a transcript of any hearings held on the postconviction or postdisposition motion should be requested. The court reporter has only 20 days after the date the transcript is requested to file it in the circuit court. Wis. Stat. § 809.30(2)(g)2. A request for preparation of a postconviction or postdisposition hearing transcript, unlike the request for transcripts at the inception of the postconviction or postdisposition process, *see supra* § 19.11, should include a request to prepare a copy for opposing counsel.

If the circuit court grants a postconviction motion in part and denies it in part such that further proceedings are necessary, the order is nonfinal, and an appeal cannot be taken until those further proceedings are completed. *State v. Wolfe*, 2019 WI App 32, ¶ 1, 388 Wis. 2d 45, 931 N.W.2d 298.

All grounds for relief must be raised in pursuing appeal under Wis. Stat. §§ 809.30 and 974.02 or will likely be deemed waived in any subsequent motions or appeals, absent "sufficient reason." *State v. Romero-Georgana*, 2014 WI 83, ¶¶ 32–35, 360 Wis. 2d 522, 849 N.W.2d 668 (quoting Wis. Stat. § 974.06(4)); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 173, 517 N.W.2d 157 (1994).

This waiver principle also applies if the issues could have been raised in a previous appeal decided under the no-merit procedure of Wis. Stat. § 809.32, as long as the court of appeals follows the no-merit procedure. *State v. Allen*, 2010 WI 89, ¶¶ 3–4, 62, 328 Wis. 2d 1, 786 N.W.2d 124. The waiver principles of *Escalona-Naranjo* have been applied to criminal-like, civil proceedings such as certiorari by prisoners and petitions for release under Wis. Stat. § 980.09. *See State v. Bush (In re Commitment of Bush)*, 2004 WI App 193, ¶¶ 12–13, 276 Wis. 2d 806, 688 N.W.2d 752, *aff'd on other grounds*, 2005 WI 103, 283 Wis. 2d 90, 699 N.W.2d 80.

IV. Motion to Modify Sentence—Wis. Stat. § 973.19; Other Sentence Challenges [§ 19.17]

For criminal defendants who seek only to modify their sentence, Wis. Stat. § 973.19 provides an alternative to the more extensive procedures of Wis. Stat. § 809.30.

Wis. Stat. § 973.19(1)(a) provides that a person who has not requested transcripts under Wis. Stat. § 809.30(2) may move the circuit court to modify a sentence or fine within 90 days after the entry of the sentence or order imposing the fine. The circuit court must then determine the motion by order within 90 days after the motion is filed; however, the court may extend by up to 90 days the time in which it must determine the motion. Wis. Stat. § 973.19(2). If the motion is not timely determined, it is deemed denied, and the circuit court clerk must immediately enter an order denying the motion. Wis. Stat. § 973.19(3).

Although the motion need not be brought for 90 days after sentencing, public defender representation is available only if the motion is filed within 20 days after entry of the sentence. Wis. Stat. § 977.05(6)(e)2. This limitation also applies to appeals from orders denying sentence modification.

It is important to note that a person who files a motion to modify a sentence or fine under Wis. Stat. § 973.19(1)(a) *waives* the right to file an appeal or postconviction motion under Wis. Stat. § 809.30. Wis. Stat. § 973.19(5). This emphasizes that the procedure under Wis. Stat. § 973.19 is not simply another piece of postconviction ammunition to be used in a never-ending assault on the conviction. As pointed out by the 1984 Judicial Council Notes to this statute, the section is aimed primarily at guilty-plea cases in which the only issue after sentencing normally will be whether the sentence was excessive. Wis. Stat. § 973.19 Judicial Council Notes—1984.

The procedure in Wis. Stat. § 973.19 was created because the procedure in Wis. Stat. § 809.30 involves a number of steps that are generally unnecessary in the context of a sentence-modification motion. For defendants sentenced to prison, SCR 71.04(5)(a) requires the court reporter to file the original transcript with the court within 120 days after sentencing, so it will be unnecessary in that situation to order a transcript.

By eliminating a number of steps from the postconviction procedure of Wis. Stat. § 809.30, the procedure for filing a motion for sentence modification under Wis. Stat. § 973.19 may save time and money, primarily because additional transcripts unnecessary to the determination of the motion will not be requested. Wis. Stat. § 973.19 should be used, however, only when the sole postconviction remedy sought is reduction of the sentence or fine.

The order determining the motion may be appealed under the rules for appealing civil matters. Wis. Stat. § 973.19(4). Therefore, an appeal of an order denying a sentence-modification motion would need to be filed under the 45/90-day rule of Wis. Stat. § 808.04(1). *See supra* ch. 5.

Comment. A puzzling aspect of this sentence-modification procedure is the excessive time allowed for the decision on the motion. The circuit court is allowed up to six months. Even if there is not the urgency in a sentence modification that there is in a motion challenging the underlying conviction, the decision period under Wis. Stat. § 973.19(2) seems unnecessarily long and likely to cause additional delay. Moreover, the six months allowed for decision may make the procedure in Wis. Stat. § 973.19 less attractive as an alternative to the Wis. Stat. § 809.30 procedure than it should be.

Motions for sentence modification may be filed at any time, even after the periods under Wis. Stat. § 973.19 or Wis. Stat. § 809.30(2)(b) have expired, if the motion is based on new factors. *See State v. Krueger*, 119 Wis. 2d 327, 332, 351 N.W.2d 738 (Ct. App. 1984). A new factor is one highly relevant to the imposition of sentence but not known to the circuit court at the time of sentencing, either because it was not then in existence or was unknowingly overlooked by all the parties. *Id.* at 333. Whether a fact or set of facts constitutes a new factor is a question of law. *Id.* Whether a new factor warrants a sentence modification rests in the discretion of the circuit court. *Id.* at 332. Of course, new factors can also be the basis of a motion for sentence modification brought

under either Wis. Stat. § 973.19 or Wis. Stat. § 809.30(2)(h). Sentence modification is not the same as resentencing. *State v. Wood*, 2007 WI App 190, ¶ 9, 305 Wis. 2d 133, 738 N.W.2d 81.

In *State v. Harbor*, 2011 WI 28, ¶ 52, 333 Wis. 2d 53, 797 N.W.2d 828, the supreme court abrogated a line of cases, beginning with *State v Michels*, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989), that had suggested an additional requirement that an alleged new factor must also frustrate the purpose of the original sentence. For two of the very few examples of a successful new-factor claim, see *State v. Doe*, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101 (holding that postsentencing assistance to law enforcement was a new factor), and *State v. Boyden*, 2012 WI App 38, ¶ 18, 340 Wis. 2d 155, 814 N.W.2d 505 (holding that presentence assistance to law enforcement may be a new factor if the fruits of that assistance were not known before sentencing). An expert's postsentencing report based on facts known or knowable at the time of sentencing is not a new factor. *See State v. Sobonya*, 2015 WI App 86, ¶ 7, 365 Wis. 2d 559, 872 N.W.2d 134.

The procedure in Wis. Stat. § 973.19 for sentence modification should not be confused with the procedure in Wis. Stat. § 973.195 for sentence adjustment. The latter is for adjustment only after a significant percentage of the imposed sentence has actually been served. *See, e.g.*, *State v. Polar*, 2014 WI App 15, 352 Wis. 2d 452, 842 N.W.2d 531.

A defendant must be in custody to obtain sentence credit under Wis. Stat. § 973.155. *State v. Friedlander*, 2019 WI 22, 385 Wis. 2d 633, 923 N.W.2d 849. Thus, a defendant mistakenly released through no fault of his or her own cannot obtain a credit for that release time because the defendant would not have been in custody and could not have been subject to conviction for escape. *Id.* ¶ 43.

The procedure for sentence modification is also different from the procedure for sentence expunction under Wis. Stat. § 973.015(1m). The sentence-expunction procedure must be invoked when the original sentence is imposed, not in postconviction proceedings. *State v. Arberry*, 2018 WI 7, ¶¶ 16, 22, 379 Wis. 2d 254, 905 N.W.2d 832; *see also State v. Braunschweig*, 2018 WI 113, ¶¶ 19–24, 384 Wis. 2d 742, 921 N.W.2d 199 (explaining difference between expunction and vacatur in regard to impact on defendant's prior conviction status for purpose of determining penalty for offenses relating to operating motor vehicle while intoxicated).

V. Release on Bond Pending Postconviction Relief—Wis. Stat. § 809.31 [§ 19.18]

A. When Release May Be Sought [§ 19.19]

Wis. Stat. § 969.01(2)(b) and (c) provide that release "upon appeal" in both felony and misdemeanor cases may be allowed in the discretion of the circuit court. Wis. Stat. § 809.31(1) provides that a defendant who seeks release on bond "pending a determination of a motion or appeal" must file a motion for release in the circuit court. Thus, unless a motion or appeal is pending, the circuit court cannot grant release. This raises the question of when an appeal or postconviction motion can be said to be pending.

The problem with determining when an appeal has been initiated or is pending in criminal cases is that a notice of appeal or postconviction motion is not actually filed until a number of preliminary steps have been taken. Given this situation, the supreme court has held it unreasonable to construe the "upon appeal" requirement as requiring that a notice of appeal be filed. *State v. Firkus*, 119 Wis. 2d 154, 156, 350 N.W.2d 82 (1984). In *Firkus*, the supreme court noted that, under the then existing criminal appeal timetable, a period of up to 225 days could pass before the defendant filed a notice of appeal or postconviction motion. To make certain that the right to release was not thereby rendered meaningless, the supreme court held that a defendant can apply for release when the appeal is commenced. The court concluded that an appeal has commenced when the first step is taken in the procedure outlined in Wis. Stat. § 809.30. *Id.* at 165–66.

The first step in the current Wis. Stat. § 809.30 procedure is the filing, within 20 days after sentencing, of a notice of intent to pursue postconviction relief. *See* Wis. Stat. § 809.30(2)(b); *see also supra* § 19.8. Therefore, a criminal defendant may file a motion in the circuit court seeking release on bond after a showing that the notice of intent has been filed.

The *Firkus* case was a misdemeanor case and arose under the former statutory scheme in which misdemeanants were entitled to release pending appeal. Nonetheless, the rationale of *Firkus* was persuasive in the felony context as well. Now that both misdemeanants and felons are held to the same discretionary standard of release pending appeal, the applicability of *Firkus* is even more persuasive.

Release may be granted only when a defendant has the right to pursue some relief within the Wisconsin court system against the sentence or conviction. *See State v. Shumate*, 107 Wis. 2d 460, 465–66, 319 N.W.2d 834 (1982). A state court cannot grant release when state remedies have been exhausted and the defendant is pursuing federal remedies. *Id.*

B. Procedure for Seeking Release [§ 19.20]

The defendant must file a motion for release in the circuit court. Wis. Stat. § 809.31(1). The circuit court must promptly hold a hearing on the motion, determine the motion by an order, and state the grounds for the order. Wis. Stat. § 809.31(2).

The decision whether to release a defendant on bond or bail upon appeal lies in the sound discretion of the circuit court. Wis. Stat. § 969.01(2)(b), (c). The exercise of discretion calls for a process of reasoning that depends on facts that are of record or reasonably derived from the record and on a conclusion based on a logical rationale founded on proper legal standards. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971); *see also supra* § 3.20.

The legal standards the circuit court must consider are set forth in Wis. Stat. § 809.31(3). This rule allows release on bond if the circuit court makes the following four findings:

1. There is no substantial risk the appellant will fail to appear to answer the judgment following the conclusion of postconviction proceedings.

2. The defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice.

3. The defendant will promptly prosecute postconviction proceedings.

4. The postconviction proceedings are not taken for purposes of delay.

In reaching its decision on the motion for release, the circuit court must also consider the nature of the crime, the length of the sentence, and any other relevant factors. Wis. Stat. § 809.31(4).

These criteria allow the circuit court to reach the merits of the proposed appeal as a basis for deciding the motion for release. *See State v. Salmon*, 163 Wis. 2d 369, 374–75, 471 N.W.2d 286 (Ct. App. 1991). Accordingly, a motion for release should identify the issues to be raised on appeal and provide sufficient information to show that they are meritorious.

A motion for release should be drafted to show the circuit court how, in the context of the particular case, it can make the four findings required by law. If the court grants the motion, it has broad discretion to set bond in accordance with Wis. Stat. § 969.09 and may impose any other terms and conditions it deems necessary. Wis. Stat. § 809.31(6).

The defendant or the state may seek review of a circuit court's order on a motion seeking release by filing a motion pursuant to Wis. Stat. § 809.31(5). The party filing the motion must request a transcript of all circuit court proceedings regarding release pending appeal and make arrangements for payment within seven days after entry of the circuit court order on release. To ensure speedy disposition, the court reporter must file the transcript with the circuit court, serve copies on the parties, and notify the clerk of the court of appeals and the parties to the appeal no more than seven days after the request. The motion seeking court of appeals review must be filed with the clerk of the court of appeals in Madison within 21 days after the entry of the circuit court's order. Wis. Stat. § 809.31(5). The opposing party may file a response within 14 days. *Id.*

The issue in the motion is whether the circuit court erroneously exercised its discretion by granting or denying bail. To find an erroneous exercise of discretion, an appellate court must find either that the circuit court failed to exercise discretion or that it exercised discretion on the basis of an error of law or irrelevant or impermissible factors. *See, e.g.*, *Barstad v. Frazier*, 118 Wis. 2d 549, 554, 348 N.W.2d 479 (1984). So long as the circuit court has considered, and made or refused to make, the four findings required by Wis. Stat. § 809.31(3) in relation to the individual case, and so long as the circuit court's consideration is evidenced on the record, there is little likelihood that the decision will be overturned.

The court of appeals will generally not make its own decision to release. If the court of appeals concludes that the circuit court erroneously exercised its discretion, the normal disposition is to reverse and remand for a reconsideration of the bail motion.

The court of appeals' decision may be reviewed by the supreme court pursuant to Wis. Stat. § 809.62. *State v. Whitty*, 86 Wis. 2d 380, 388–89, 272 N.W.2d 842 (1978). This is the same procedure outlined in chapter 23, *infra*, for filing a petition for review. Review by the supreme court should occur only in extremely unusual cases.

Although Wis. Stat. § 809.31(5) states that the defendant or state may seek review in the court of appeals of a circuit court order to grant or deny a request for release, there is uncertainty as to whether this is true when the supreme court has granted a petition for review. As noted by the dissent in *State v. McKellips*, 2016 WI 51, ¶ 119, 369 Wis. 2d 437, 881 N.W.2d 258 (Abrahamson, J., dissenting), the court of appeals declined to review the circuit court order denying relief, stating, "Because this appeal is currently pending in the Wisconsin Supreme Court, the motion should be filed in that court."

C. Stays of Sentence [§ 19.21]

Upon sentencing, the circuit court cannot stay execution of the sentence except for legal cause or as provided by statute. *State v. Braun*, 100 Wis. 2d 77, 83, 301 N.W.2d 180 (1981). Release pending appeal as provided in Wis. Stat. §§ 969.01(2)(b), (c), and 809.31 is discussed in section 19.20, *supra*. Wis. Stat. § 973.15(8)(a), enacted after *Braun*, provides statutory authority allowing a circuit court to grant a stay of sentence for not more than 60 days. This provision appears to be limited only by the sound discretion of the circuit court and is evidently broad enough to accommodate a stay to allow a defendant to put his or her affairs in order. *See also* Wis. Stat. § 973.09(1)(a) (probation). Outside these statutory provisions, the courts have not defined what constitutes legal cause for a stay of execution of sentence. *Braun*, 100 Wis. 2d at 85.

VI. Habeas Corpus and Postconviction Relief Under Wis. Stat. § 974.06 [§ 19.22]

A. In General [§ 19.23]

Habeas corpus and postconviction relief under Wis. Stat. § 974.06 are specialized subjects of considerable complexity that go beyond the scope of a general appellate-practice manual. The following discussion is merely intended to alert attorneys to the existence of these remedies and to identify the basic underlying concepts. Note that a party may file only one motion for relief under Wis. Stat. § 974.06 and one petition for habeas corpus unless the party can show why the issues raised in a second motion or petition could not have been raised in the first motion or petition. *See State ex rel. Schmidt v. Cooke*, 180 Wis. 2d 187, 189, 509 N.W.2d 96 (Ct. App. 1993); *see also State v. Lo*, 2003 WI 107, ¶ 15, 264 Wis. 2d 1, 665 N.W.2d 756 ("[C]laims of error that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 motion absent a showing of a sufficient reason.").

There is no absolute right to counsel for indigent defendants in collateral proceedings such as habeas petitions and Wis. Stat. § 974.06 motions. The Office of the State Public Defender has authority to appoint counsel if it determines that "the case should be pursued." Wis. Stat. § 977.05(4)(j). In exercising this discretion, the state public defender considers a number of factors, including the likelihood of success if counsel is appointed and whether the issue is of statewide importance, is significant to the development of the law, and is so complex that representation by an attorney is necessary. Generally, a separate appointment of counsel is necessary to proceed in habeas or Wis. Stat. § 974.06 cases. Consequently, before filing collateral challenges, already-appointed counsel should contact the Office of the State Public Defender for a discretionary determination whether the case should be pursued.

B. Habeas Corpus [§ 19.24]

Habeas corpus may be used in limited circumstances to challenge jurisdiction and seek review of alleged constitutional errors at both the preconviction and postconviction stages. *See State ex rel. Kelley v. Posner*, 91 Wis. 2d 301, 303, 282 N.W.2d 633 (Ct. App. 1979).

Habeas corpus, not a motion under Wis. Stat. § 974.06, is the proper remedy to challenge a denial of good-time credits. *State v. Johnson*, 101 Wis. 2d 698, 305 N.W.2d 188 (Ct. App. 1981). Habeas corpus has also been used to challenge extradition, *State ex rel. Onapolis v. State*, 2006 WI App 84, 292 Wis. 2d 819, 716 N.W.2d 169; detention beyond lawful release date, *State ex rel. Woods v.*

Morgan, 224 Wis. 2d 534, 591 N.W.2d 922 (Ct. App. 1999); and probation revocation when certiorari is unavailable, *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 522–23, 563 N.W.2d 883 (1997).

A person who seeks habeas relief must meet three criteria. The petition should show (1) a restraint on liberty, (2) the restraint was imposed either by a court without jurisdiction or contrary to constitutional protections, and (3) no other adequate, alternative form of relief is available. *Amy W. v. David G. (In re Termination of Parental Rts. to Alexandria G.)*, 2013 WI App 83, ¶ 6, 348 Wis. 2d 593, 834 N.W.2d 432.

To qualify for habeas relief, the petitioner first must be "restrained of personal liberty." Wis. Stat. § 782.01(1). This statutory phrase is synonymous with the federal requirement that the petitioner be in custody. *See State ex rel. Wohlfahrt v. Bodette*, 95 Wis. 2d 130, 133–34, 289 N.W.2d 366 (Ct. App. 1980). The restraint need not be actual custody, but simply a restraint not imposed on the public at large. *Id.* at 133. Release on personal recognizance is a restraint on liberty. *Id.* A deposit required in a traffic-regulation case, however, is not a restraint entitling the defendant to habeas corpus. *Kelley*, 91 Wis. 2d at 304–05.

Wis. Stat. ch. 782 governs the procedure for seeking habeas relief. A writ of habeas corpus may be sought in both the circuit court and an appellate court. Wis. Stat. § 782.03. The writ generally should be sought first in the circuit court. If sought first in an appellate court, the appellate court may transfer the matter to the circuit court on the ground that the circuit court has more knowledge about the matter. *See State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 231–33, 369 N.W.2d 743 (Ct. App. 1985); *see also State ex rel. Johnson v. Board of Supervisors*, 165 Wis. 164, 161 N.W. 356 (1917). If the circuit court denies the petition for the writ, review can be had in the court of appeals by appeal.

One type of proceeding in which habeas corpus properly is sought for the first time in the appellate court, however, is when a defendant raises a claim of ineffective assistance of appellate counsel. *See State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). In fact, habeas corpus is the exclusive method for reviewing such a claim, and such claims are subject to the doctrine of laches. *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶¶ 27, 29, 387 Wis. 2d 50, 928 N.W.2d 480; *State v. Evans*, 2004 WI 84, ¶¶ 4, 34–35, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 29, 290 Wis. 2d 352, 714 N.W.2d 900. The court of appeals has drawn a distinction between postconviction and appellate counsel, such that a claim of ineffective assistance against the former must be brought by a Wis. Stat. § 974.06 motion (or a petition for habeas corpus) *in the circuit court* and against the latter by habeas corpus *in the court of appeals*. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996); *see also State ex rel. Warren v Meisner*, 2020 WI 55, ¶ 5, 392 Wis. 2d 1, 944 N.W.2d 588 (holding that appropriate forum for raising ineffective assistance of counsel is the court in which the alleged ineffectiveness took place). But the rule that relief must be sought in the court where the alleged ineffectiveness occurred does not apply when the forum is unable to provide the necessary relief. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶¶ 3, 38, 354 Wis. 2d 626, 847 N.W.2d 805. Thus, when the claim of ineffective assistance involves a trial attorney's failure to file a timely notice of intent to pursue postconviction relief, the habeas petition should be filed in the court of appeals, because only that court can grant an extension of the time frame to file the notice. *Id.*

Because an appellate court cannot make findings of fact, the court of appeals is placed in a difficult situation when considering a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel. In cases in which fact-finding is necessary to resolve the petition, the court of appeals may appoint a fact-finding referee, *see State v. Flores*, 170 Wis. 2d 272, 278–79, 488 N.W.2d 116 (Ct. App. 1992), *habeas corpus denied sub nom. State ex rel. Flores v. State*, 183 Wis. 2d 587, 516 N.W.2d 362 (1994), or remand the matter to the circuit court for fact-finding, *see State ex rel. Santana v. Endicott*, 2006 WI App 13, ¶ 5, 288 Wis. 2d 707, 709 N.W.2d 515. The supreme court, not the court of appeals, should hear a petition for a writ of habeas corpus that claims counsel was ineffective in preparing a petition for supreme court review. *State ex rel. Schmelzer v. Murphy*, 195 Wis. 2d 1, 535 N.W.2d 459 (Ct. App. 1995) (denying writ), *rev'd on other grounds*, 201 Wis. 2d 246, 548 N.W.2d 45 (1996) (granting writ, but denying relief).

Notwithstanding the absence of physical restraint from liberty, habeas relief may be sought in termination-of-parental-rights cases in which ineffective assistance of appellate counsel has deprived a party of an alternative remedy via appeal as of right. *Amy W.*, 2013 WI App 83, ¶ 1, 348 Wis. 2d 593.

Habeas corpus does not lie when there is an adequate alternative remedy. *State ex rel. Wolke v. Fleming*, 24 Wis. 2d 606, 614, 129 N.W.2d 841 (1964); *see, e.g.*, *State ex rel. Reddin v. Galster*, 215 Wis. 2d 179, 183–84, 572 N.W.2d 505 (Ct. App. 1997) (holding that review of parole and probation revocation is by certiorari). Consistent with this proviso, the court of appeals has been known to

deny habeas relief from nonfinal orders on the ground that relief may be sought by leave to appeal pursuant to Wis. Stat. § 809.50. In particular, the long-standing rule that petitioning for a writ of habeas corpus was the appropriate way to challenge a bindover—an order that remands to custody a prisoner committed for trial under Wis. Stat. § 970.03—has been overturned on the ground that a bindover may now be challenged by a motion to dismiss and then reviewed by leave to appeal. *See State ex rel. Dowe v. Waukesha Cnty.*, 184 Wis. 2d 724, 516 N.W.2d 714 (1994). Moreover, laches may be grounds for denying habeas relief. *Lopez-Quintero*, 2019 WI 58, ¶¶ 27, 29, 387 Wis. 2d 50. The standards for determining whether laches bars relief are set forth in *Lopez-Quintero*, 2019 WI 58, ¶ 16, 387 Wis. 2d 50 (citing *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶ 28–29, 290 Wis. 2d 352, 714 N.W.2d 900, *clarified on denial of reconsideration*, 2006 WI 121, 297 Wis. 2d 587, 723 N.W.2d 424). Moreover, even if the party asserting laches proves all the elements of the defense, the reviewing court has discretion to deny relief if it determines that relief is not appropriate and equitable. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 15, 389 Wis. 2d 516, 936 N.W.2d 587, *cert. denied*, 140 S. Ct. 2831 (2020).

Because habeas is a civil action, *see Maier v. Byrnes*, 121 Wis. 2d 258, 260, 358 N.W.2d 833 (Ct. App. 1984), an appeal of a denial of the writ is commenced under the 45/90-day rule pursuant to Wis. Stat. § 808.04(1). *See supra* § 5.4. Note, however, that an appeal from an order denying a habeas corpus challenge to a bindover must be taken as a permissive appeal pursuant to Wis. Stat. §§ 808.03(2) and 809.50. *See* Wis. Stat. § 974.02(1); *see also supra* ch. 9.

If a writ of habeas corpus is sought in an appellate court, the procedure varies from that prescribed in Wis. Stat. ch. 782. The petition must still comply with Wis. Stat. § 782.04, but the procedures in that section for issuing the writ, filing a return, and producing the prisoner for hearing do not apply. When a petition for habeas corpus is filed in an appellate court, the procedure for supervisory writ is followed. *See State ex rel. LeFebre v. Abrahamson*, 103 Wis. 2d 197, 202, 307 N.W.2d 186 (1981); *see also supra* § 10.3. If a defendant seeks habeas relief in the court of appeals by supervisory writ pursuant to Wis. Stat. § 809.51, the court cannot deny the petition ex parte on grounds of untimeliness but must order a response, in which the state bears the burden of asserting the defense of laches and establishing prejudice resulting from delay. *Lopez-Quintero*, 2019 WI 58, ¶ 10, 387 Wis. 2d 50.

As an alternative to filing a petition under Wis. Stat. ch. 782, a person may file a summons and complaint to commence a civil action seeking habeas relief in the circuit court. Wis. Stat. §§ 781.01, 801.02(5).

C. Motions Under Wis. Stat. § 974.06 [§ 19.25]

A motion under Wis. Stat. § 974.06 is essentially a postconviction substitute for habeas corpus. *Peterson v. State*, 54 Wis. 2d 370, 381, 195 N.W.2d 837 (1972). Indeed, Wis. Stat. § 974.06(8) provides that habeas must not be entertained if it appears the defendant has not first sought relief from the sentencing court by motion and that the court has denied the motion. An exception to this rule exists when the motion remedy is inadequate or ineffective.

A motion under Wis. Stat. § 974.06 is not a substitute for an appeal or a postconviction motion under Wis. Stat. § 809.30. A motion under Wis. Stat. § 974.06 cannot be made until the defendant has exhausted those direct remedies or until the time for exercising those remedies has passed. Wis. Stat. § 974.06(1); *Peterson*, 54 Wis. 2d at 381. Once this has occurred, however, a motion under Wis. Stat. § 974.06 may be brought at any time. Wis. Stat. § 974.06(2). Issues considered on appeal or a postconviction motion under Wis. Stat. § 809.30 will not be reconsidered on a motion under Wis. Stat. § 974.06. *Beamon v. State*, 93 Wis. 2d 215, 221, 286 N.W.2d 592 (1980).

Although the motion may be brought at any time, Wis. Stat. § 974.06(4) contemplates that only one motion will be filed. *But see State ex rel. Schmidt v. Cooke*, 180 Wis. 2d 187, 189, 509 N.W.2d 96 (Ct. App. 1993). A Wis. Stat. § 974.06 motion that is dismissed because of the movant's escape from prison is deemed to be a finally adjudicated motion under Wis. Stat. § 974.06(4), thus barring a second motion. *See State v. Braun*, 178 Wis. 2d 249, 253–55, 504 N.W.2d 118 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 153, 516 N.W.2d 740 (1994).

A motion under Wis. Stat. § 974.06 is limited to matters of jurisdictional or constitutional dimensions. *See, e.g.*, Wis. Stat. § 974.06(1); *Peterson*, 54 Wis. 2d at 381. Issues involving sufficiency of the evidence, jury instructions, error in the admission of evidence, or other procedural matters cannot be reached by a motion under Wis. Stat. § 974.06. *Peterson*, 54 Wis. 2d at 381. However, the Wis. Stat. § 974.06 remedy may be used to present newly discovered evidence. *State v. Bembenek*, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987). Moreover, sufficiency of the evidence has been deemed a constitutional issue by a U.S. Supreme Court decision issued after *Peterson*. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *see also State v. Miller*, 2009 WI App

111, ¶ 30, 320 Wis. 2d 724, 772 N.W.2d 188 (clarifying that language in *Peterson* excluding sufficiency-of-evidence claims from scope of Wis. Stat. § 974.06 is no longer controlling).

A motion under Wis. Stat. § 974.06 is brought in the circuit court that imposed the challenged sentence. Wis. Stat. § 974.06(1). The circuit court may vacate, set aside, or modify the sentence. *Id.* The procedure for handling the motion is set forth in Wis. Stat. § 974.06(3).

The attractiveness of a motion under Wis. Stat. § 974.06 is that the motion ensures that jurisdictional and constitutional issues may always be raised, even if the time for appeal or postconviction motion under Wis. Stat. § 809.30 has expired. The one limitation on this lack of a time limit is that the defendant must be "in custody under sentence of a court." Wis. Stat. § 974.06(1); *see also State v. Bell*, 122 Wis. 2d 427, 362 N.W.2d 443 (Ct. App. 1984). The custody requirement is liberally interpreted. *See State v. Theoharopoulos*, 72 Wis. 2d 327, 331, 240 N.W.2d 635 (1976). A person no longer in custody may seek postconviction relief to correct factual errors unknown at the time of trial under the common-law writ of *coram nobis*. *See State v. Heimermann*, 205 Wis. 2d 376, 384, 556 N.W.2d 756 (Ct. App. 1996). Such relief is granted, however, only if (1) no other remedy is available, and (2) the factual error to be corrected was crucial to the conviction *and* was not previously passed on by the circuit court. *Id.* Wisconsin has rejected arguments to enlarge *coram nobis* to encompass certain legal errors. *State ex rel. Patel v. State*, 2012 WI App 117, ¶¶ 14–18, 344 Wis. 2d 405, 824 N.W.2d 862.

In addition, issues that could have been raised by direct appeal or postconviction motion cannot be raised by a Wis. Stat. § 974.06 motion unless there is "sufficient reason" given as to why the issue was not raised or was inadequately raised. Wis. Stat. § 974.06(4); *see also State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Noting that the purpose of this limitation is to prevent a defendant from strategically waiting to raise a claim until memories are stale and witnesses and records are unavailable, the court of appeals held that a challenge to a sentence enhancement pursuant to Wis. Stat. § 973.13 can be raised at any time, even if it could have been challenged earlier, because the defendant has nothing to gain by waiting to make such a challenge. *State v. Flowers*, 221 Wis. 2d 20, 27–30, 586 N.W.2d 175 (Ct. App. 1998). A subsequent change in the law may be sufficient reason for allowing a new issue to be raised by a Wis. Stat. § 974.06 motion. *See State v. Howard*, 199 Wis. 2d 454, 544 N.W.2d 626 (Ct. App. 1996), *aff'd*, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), *overruled on other grounds by State v. Gordon*, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765. A prior sentence-modification motion is not, however, a constitutional claim and does not trigger the requirement that the defendant later show "sufficient reason" why the constitutional issue now raised in a Wis. Stat. § 974.06 motion was not included in an earlier sentence-modification motion. *See State v. Starks*, 2013 WI 69, ¶ 46, 349 Wis. 2d 274, 833 N.W.2d 146, *overruled in part on other grounds by State ex rel. Warren v. Meisner*, 2020 WI 55, ¶¶ 5, 37–38, 43, 392 Wis. 2d 1, 944 N.W.2d 588.

A previous no-merit appeal is a previous motion or appeal for purposes of Wis. Stat. § 974.06(4). *State v. Allen*, 2010 WI 89, ¶ 41, 328 Wis. 2d 1, 786 N.W.2d 124. Therefore, issues that could have been raised in the no-merit report or response under Wis. Stat. § 809.32 cannot be raised in a subsequent Wis. Stat. § 974.06 motion absent "sufficient reason" for not raising them previously. *Id.*

Proceedings under Wis. Stat. § 974.06 are considered civil proceedings, and the burden is on the defendant to show an entitlement to relief by clear and convincing evidence. *See* Wis. Stat. § 974.06(6); *State v. Walberg*, 109 Wis. 2d 96, 102, 325 N.W.2d 687 (1982). To obtain an evidentiary hearing on a Wis. Stat. § 974.06 motion, the movant, even if self-represented, must meet an exacting level of specificity: within the four corners of the document itself, the motion must allege facts showing "who, what, where, when, why, and how" relief is warranted. *State v. Balliette*, 2011 WI 79, ¶¶ 58–59, 68, 336 Wis. 2d 358, 805 N.W.2d 334. If the allegation is that appellate counsel provided ineffective assistance of counsel by failing to raise an issue, the defendant must show that the issue was "clearly stronger" than the issues that counsel raised on direct appeal. *See Starks*, 2013 WI 69, ¶ 59, 349 Wis. 2d 274.

There is no right to counsel on a motion under Wis. Stat. § 974.06. *State v. Alston*, 92 Wis. 2d 893, 895, 288 N.W.2d 866 (Ct. App. 1979). The circuit court is required, however, to refer the matter to the state public defender for discretionary appointment of counsel if it appears that counsel is necessary and if the defendant claims or appears to be indigent. Wis. Stat. § 974.06(3)(b).

An appeal may be taken to the court of appeals from the order that finally disposes of a motion under Wis. Stat. § 974.06. Because this is an appeal in a civil case, the appeal must be commenced under the 45/90-day rule in Wis. Stat. § 808.04(1). *See supra* § 5.4.

Consistent with the trend toward telephone conferences, a motion under Wis. Stat. § 974.06 may be heard by telephone. Wis. Stat. § 974.06(5).

VII. State's Appeals—Wis. Stat. § 974.05 [§ 19.26]

Under Wis. Stat. § 974.05, the state may appeal from any of the following:

1. A final order or judgment adverse to the state, whether following a trial or plea of guilty or no contest, if the appeal would not be prohibited by constitutional protections against double jeopardy;

   Note. The state may appeal as of right from an order dismissing a criminal complaint under Wis. Stat. § 974.05(1)(a). *See State v. Wilson*, 2000 WI App 114, ¶¶ 1, 7, 235 Wis. 2d 177, 612 N.W.2d 368.

2. An order granting postconviction relief pursuant to Wis. Stat. § 974.02, 974.06, or 974.07;

3. A judgment or sentence or an order of probation not authorized by law; or

4. An order or judgment that has the substantive effect of quashing an arrest warrant, suppressing evidence, or suppressing a confession or admission.

   Note. Although there is a difference between suppressed evidence and excluded evidence, the state may appeal from an order excluding evidence if that order is outcome-determinative. *State v. Eichman*, 155 Wis. 2d 552, 562–66, 456 N.W.2d 143 (1990); *see also State v. Maass*, 178 Wis. 2d 63, 67, 502 N.W.2d 913 (Ct. App. 1993).

An appeal by the state must be initiated by filing a notice of appeal with the circuit court within 45 days after the entry of the order or judgment to be reviewed. Wis. Stat. §§ 974.05(1), 808.04(4). The notice of appeal must be served on the defendant or defense counsel. Wis. Stat. § 974.05(3).

If the state is a respondent, it may seek review of adverse rulings. Contrary to the express language of Wis. Stat. § 974.05(2), the supreme court has held that the state need not file a cross-appeal to obtain review of adverse rulings if all that is sought is the raising of an error that, if corrected, would sustain the judgment. *State v. Alles*, 106 Wis. 2d 368, 390, 316 N.W.2d 378 (1982). The state cannot seek review by cross-appeal of issues that it could not raise by direct appeal. *State v. Newman*, 162 Wis. 2d 41, 48–50, 469 N.W.2d 394 (1991).

In an appeal by the state in which the defendant is a child or claims or appears to be indigent, the court must refer the defendant to the state public defender for a determination of indigency and appointment of counsel. Wis. Stat. § 809.30(3). Like any other respondent, a defendant in a state's appeal must file a cross-appeal if he or she seeks to modify the underlying circuit court judgment or order. *State v. Wright*, 143 Wis. 2d 118, 124–25, 420 N.W.2d 395 (Ct. App. 1988); *see supra* § 8.3 (cross-appeals).

VIII. No-Merit Reports and No-Merit Petitions for Review—Wis. Stat. § 809.32 [§ 19.27]

A. No-Merit Reports [§ 19.28]

Under Wis. Stat. § 809.30, a person's postconviction or postdisposition counsel is appointed before the transcripts and the notice of appeal or postconviction or postdisposition motion are filed. Because the appointment of counsel is contingent merely on the person's indigency, not on the merits of any postconviction or postdisposition challenge, appointed counsel may determine, after review of the case, that there is no arguable merit to an appeal.

In such cases, if a person does not consent to close the file without an appeal and also does not wish to pursue an appeal with or without retained counsel, counsel may seek permission to withdraw by filing a no-merit report with the court of appeals. A person who disagrees with counsel's opinion that the appeal would have no merit has a right to insist that a no-merit report be filed and has a right to be informed of the right to such a report. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 516 N.W.2d 362 (1994).

The no-merit procedure is outlined in Wis. Stat. § 809.32 and is based on the premise that if appointed counsel finds a case to be wholly frivolous after a conscientious examination of the record, counsel may so advise the court and request permission to withdraw. (Wis. Stat. § 809.32 codifies the so-called *Anders* review procedures set forth in *Anders v. California*, 386 U.S. 738, 744 (1967).) Although typically employed in criminal cases, the no-merit procedure is applicable in other proceedings involving appointed counsel under Wis. Stat. § 809.30, including Wis. Stat. ch. 51, 55, 938, and 980 cases and most Wis. Stat. ch. 48 cases. For specific no-merit procedures in termination-of-parental-rights cases, see Wis. Stat. § 809.107(5m).

Wis. Stat. § 809.32(1)(b)1. requires appointed counsel to make specific disclosures to the client about the options available when an attorney believes an appeal has no merit, including a person's right to a no-merit report, the person's right to proceed without counsel or to retain counsel, or the person's right to simply allow the file to be closed without an appeal. In addition, Wis. Stat. § 809.32(1)(b)2. requires the attorney to advise the client of the right to challenge a no-merit report by filing a response and the right to obtain a copy of the transcripts and the circuit court case record upon request. Appointed counsel must also inform the client that counsel may file a supplemental no-merit report and affidavits that contain facts outside the record, which may include confidential information, to rebut allegations made in the person's response to the no-merit report.

To ensure that the client has been advised of these rights, counsel must include with the no-merit report a signed certification following a form specified in the rules of appellate procedure. Wis. Stat. § 809.32(1)(c). Furthermore, if the client requests a copy of the transcript and the circuit court case record, the attorney must serve those documents on the client within five days after the request and must file a statement with the court of appeals that service has been made. Wis. Stat. § 809.32(1)(d). In a no-merit appeal, a defendant is also entitled to access and a meaningful viewing of the presentence investigation report. *State v. Parent*, 2006 WI 132, ¶¶ 5, 43–46, 298 Wis. 2d 63, 725 N.W.2d 915. An appellate court cannot affirm a conviction based on a no-merit report if the defendant was not provided with portions of the record and transcripts sufficient to respond to the no-merit report. *State v. Stevenson*, 2006 WI 19, 289 Wis. 2d 16, 710 N.W.2d 458.

The rules do not establish separate deadlines for filing the notice of appeal or statement on transcript. Rather, those documents must be filed within (1) 180 days after service of the transcript and circuit court case record requested under Wis. Stat. § 809.30(2)(e), or (2) 60 days after the entry of the order determining a postconviction or postdisposition motion. *See* Wis. Stat. § 809.32(2). A notice of appeal and statement on transcript should be filed at least 40 days before the deadline for filing the no-merit report, thereby allowing time for the circuit court clerk to compile and transmit the record to the court of appeals and for appellate counsel to include record citations in the no-merit report. The notice of appeal must be identified as a no-merit notice of appeal and must state the date on which the no-merit report is due and whether the due date is calculated under Wis. Stat. § 809.32(2)(a)1. or 2. Copies of all the above documents must be served on the state and all other parties. Wis. Stat. § 809.32(2).

The no-merit report must be filed with the court of appeals within 14 days after the date the record is filed in the office of the clerk of the court of appeals. Wis. Stat. § 809.32(2)(d). One copy is served on the person for whom counsel has been appointed; that person may file a response within 30 days after service. Wis. Stat. § 809.32(1)(d), (e). Postconviction counsel must also file a statement in the court of appeals showing that the no-merit report has been served on the person. Wis. Stat. § 809.32(1)(d). Although the filing of a response to a no-merit report is not required, failure to file a response may be viewed as a waiver of the right to later raise by a Wis. Stat. § 974.06 motion an issue that a defendant could have raised in the response to the no-merit report. *See State v. Allen*, 2010 WI 89, ¶ 4, 328 Wis. 2d 1, 786 N.W.2d 124.

The no-merit report must demonstrate that appointed counsel has conducted a thorough review of the record; the evaluation must be as conscientious as it would be if performed by paid counsel. *McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 444 (1988). The report must identify anything in the record that might arguably support the appeal and explain why the potential issues lack merit. Wis. Stat. § 809.32(1)(a). If the court of appeals accepts the no-merit report and affirms the judgment, but a meritorious issue is subsequently discovered that could have been raised on appeal, this may constitute a "sufficient reason" such that a defendant may later seek relief by filing a motion under Wis. Stat. § 974.06. *State v. Fortier*, 2006 WI App 11, ¶ 27, 289 Wis. 2d 179, 709 N.W.2d 893. The supreme court has also held, however, that a motion under Wis. Stat. § 974.06 is procedurally barred when the court of appeals properly followed the no-merit procedure, and the issues raised in the Wis. Stat. § 974.06 motion could have been raised in response to the no-merit report. *State v. Allen*, 2010 WI 89, ¶ 93, 328 Wis. 2d 1, 786 N.W.2d 124.

The format and length requirements of a no-merit report are set forth in Wis. Stat. § 809.32(1)(a). The report must be submitted with a signed certification setting forth the word or page count. *Id.* Wis. Stat. § 809.32(1)(c) sets forth the form of the certification.

The format and length requirements of any response are set forth in Wis Stat. § 809.32(1)(e). The report and response, if any, are submitted to the court of appeals, which independently reviews the record to search for possible bases for appeal other than those identified and discounted in the no-merit report.

Appointed counsel has the right to file a rebuttal to the response to the no-merit report, under limited circumstances when the attorney is aware of facts outside the record that rebut allegations made in the response. Wis. Stat. § 809.32(1)(f). Under those circumstances, counsel may file, within 30 days after the response, a supplemental no-merit report supported by an affidavit or affidavits, including facts outside the record that may be confidential. Wis. Stat. § 809.32(1)(b)2., (f). The supplemental report with attachments must be served upon the person who filed the response, and counsel must file a statement with the court of appeals that service has been made. Wis. Stat. § 809.32(1)(f). No-merit reports and supplemental no-merit reports, if any, must also be filed electronically, pursuant to the rules described in section 18.3, *supra*.

If the appellate court concludes that there is a dispute of fact regarding matters outside the record, and if the court concludes that the client's version of the facts, if true, would make summary disposition based on the no-merit report inappropriate, the court must remand the case to the circuit court for an evidentiary hearing and fact-finding. Wis. Stat. § 809.32(1)(g).

If, upon consideration of the no-merit report, and any response and supplemental report, the court finds that further appellate proceedings would be frivolous, it issues a per curiam opinion or summary order affirming the judgment and relieving the person's appointed counsel of further representational duties. Wis. Stat. § 809.32(3); *see also infra* § 21.25. If the court determines that meritorious issues exist, it denies the request to withdraw, identifies the issues, and orders that a postconviction motion or appeal under Wis. Stat. § 809.30 be pursued. *See Cleghorn v. State*, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). Even if the no-merit report is accepted, appointed counsel must inform the person of the right to seek discretionary supreme court review under Wis. Stat. § 809.62. Wis. Stat. § 809.32(3), (4).

Review by the supreme court of a court of appeals decision to accept a no-merit report is governed by whether the court of appeals properly exercised its discretion. *State v. Foster*, 2014 WI 131, ¶¶ 28–29, 360 Wis. 2d 12, 856 N.W.2d 847. The supreme court does not conduct an independent *Anders* review but determines whether the court of appeals considered the relevant facts and law and used a demonstrative reasoning process to reach a reasonable result. *Id.*

As in other appeals, the court of appeals has discretion to review waived (forfeited) issues when deciding a no-merit report. *See State v. Sutton*, 2012 WI 23, ¶ 44, 339 Wis. 2d 27, 810 N.W.2d 210. This discretionary decision ordinarily will not be subject to supreme court review so long as it is based on a proper view of the law. *Id.* ¶ 45.

The supreme court has defended the no-merit procedure by noting that full representation and a formal no-merit report are required in appeals as of right to the court of appeals. It is therefore unnecessary to require a full no-merit report on a discretionary petition for review. *State v. Mosley*, 102 Wis. 2d 636, 668, 307 N.W.2d 200 (1981). A person's right to a no-merit report applies only on direct appeal, when the right to counsel is absolute, and not to collateral review, when such appointment is merely discretionary. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Thus, counsel need not file a no-merit report following denial of a Wis. Stat. § 974.06 motion, after concluding that an appeal would raise only frivolous issues. *See* Wis. Stat. § 974.06.

Wisconsin has rejected the argument that a no-merit report results in defense counsel arguing against the client, in violation of the client's constitutional right to assistance of counsel. *See Cleghorn*, 55 Wis. 2d at 475; *see also McCoy*, 486 U.S. 429 (1988), *aff'g* 137 Wis. 2d 90, 403 N.W.2d 449 (1987).

B. No-Merit Petitions for Review [§ 19.29]

Wis. Stat. § 809.32(4) sets forth the no-merit procedure for a case that the court of appeals has reviewed on the merits, but for which appointed counsel believes that further pursuit of appeal by a petition for supreme court review would be frivolous. Under this procedure, if a person insists on filing a petition for supreme court review, appointed counsel must file, within 30 days after the court of appeals' decision, a partial petition containing the statement of the case, *see* Wis. Stat. § 809.62(2)(d), and an appendix as required by Wis. Stat. § 809.62(2)(f). The remainder of the petition, containing the elements covered in Wis. Stat. § 809.62(2)(a), (b), (c), and (e), must be filed in a supplemental petition by the person seeking supreme court review. These elements are the issues, a table of contents, the reasons the court should take review, and the argument. The supplemental petition cannot exceed 35 pages if a monspaced font or handwriting is used or 8,000 words if a proportional serif font is used. Wis. Stat. § 809.32(4)(a).

IX. Extending Time Limits for Appeals Under Wis. Stat. § 809.30 [§ 19.30]

With few exceptions, any time period in the rules of appellate procedure applicable to appeals under Wis. Stat. § 809.30 may be extended pursuant to Wis. Stat. § 809.82(2). One exception is that the 30-day period for filing a petition for review in the supreme court cannot be extended for any reason. *First Wis. Nat'l Bank v. Nicholaou*, 87 Wis. 2d 360, 365, 274 N.W.2d 704 (1979); *see also infra* § 23.3. Another exception is that the time for filing a motion for reconsideration cannot be enlarged. Wis. Stat. § 809.82(2)(e). Finally, the time for appeal in an adoption case cannot be extended. Wis. Stat. § 808.04(7). Otherwise, extensions may be granted on the court's own motion or on a motion of a party supported by good cause. Time periods may also be reduced. *See also supra* § 18.9.

The court of appeals has exclusive authority to grant extensions of Wis. Stat. § 809.30 time periods. *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 22, 354 Wis. 2d 626, 847 N.W.2d 805. All time periods under Wis. Stat. § 809.30 are considered part of the appeal process, even if a notice of appeal has not yet been filed to bring the matter before the court of appeals. The court of appeals can enlarge the time for filing a notice of intent to seek postconviction relief for "good cause" under Wis. Stat. § 809.82(2)(a). *State v. Quackenbush*, 2005 WI App 2, ¶¶ 22–23, 278 Wis. 2d 611, 692 N.W.2d 340. Among the factors to consider are the extent to which the delay appears to have been without fault, the promptness of requesting an extension, and the avoidance of a disproportionate expenditure of judicial resources to decide the motion. *Id.* ¶ 14. If, however, a notice of intent was not timely filed because of ineffective assistance of trial counsel, a habeas petition filed in the court of appeals is the proper method for seeking an extension of the time frame. *Kyles*, 2014 WI 38, ¶¶ 38, 39, 58, 354 Wis. 2d 626.

The most significant difference between extensions of time in civil appeals and Wis. Stat. § 809.30 appeals concerns the time for filing the notice of appeal or cross-appeal to the court of appeals. The time for appeal or cross-appeal in a civil case cannot be enlarged under any circumstances. Wis. Stat. § 809.82(2)(b). However, with the exception of adoption appeals, all appeals conducted under the appeal procedure of Wis. Stat. § 809.30 are exempt from the prohibition against enlargement. *Id.*

Note that the time for filing a notice of cross-appeal following a state's appeal in a criminal case cannot be enlarged unless the defendant-cross-appellant has previously filed a motion under Wis. Stat. § 809.30. *See State v. Williams*, 2005 WI App 122, ¶¶ 3–4, 284 Wis. 2d 488, 699 N.W.2d 249.

Attorneys should be aware that several criminal-like proceedings, such as habeas corpus and appeals from Wis. Stat. § 974.06 motions, are civil proceedings and, therefore, subject to the nonextendable appeal periods of Wis. Stat. § 808.04.

A motion to extend any time limit under Wis. Stat. § 809.30 should be made, if possible, before the period expires. Motions for extension may be brought after a time period has expired, *see* Wis. Stat. § 809.82(2)(a), but the court will look more critically at such motions, particularly if they are filed by a person who has been continuously represented by counsel.

The court of appeals has a generally lenient policy about granting extensions that will enable a criminal defendant to pursue an appeal. This is particularly true if the public defender or other counsel indicates the appeal will be pursued if the extension is granted.

Wis. Stat. § 809.82(2) is not intended to be used as a shortcut to obtain relief that would otherwise require a determination of substantive rights. For example, a party seeking to extend the time to appeal based on ineffective assistance of prior appellate counsel cannot use Wis. Stat. § 809.82(2) as an alternative to challenging ineffective assistance by the normal method of habeas corpus. *State v. Evans*, 2004 WI 84, ¶¶ 55–56, 59, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 29, 290 Wis. 2d 352, 714 N.W.2d 900.

Supplement Chapter 20
One-Judge Appeals

Book section supplemented: 20.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

20.1 Scope

Page 2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 20
One-Judge Appeals

I. Scope
[§ 20.1]

Wis. Stat. § 752.31(2) identifies cases that are decided by only one court of appeals judge, rather than by a three-judge panel. These cases involve misdemeanors, civil forfeitures, traffic-regulation and municipal-ordinance violations, and cases under Wis. Stat. ch. 48 (Children's Code), Wis. Stat. ch. 51 (Mental Health Act), Wis. Stat. ch. 55 (protective services and protective placement), Wis. Stat. ch. 785 (contempt orders), Wis. Stat. ch. 799 (small claims actions), and Wis. Stat. ch. 938 (Juvenile Justice Code). In 2020, these cases constituted approximately 20% of the cases filed in the Wisconsin Court of Appeals. Wis. Court of Appeals, *Court of Appeals Annual Report 2020*, https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=391847. In these cases, all appeals or other proceedings (such as petitions for leave to appeal or for supervisory relief) are decided by one judge unless the court of appeals orders that the case be heard by a three-judge panel. [1]

The cases identified in Wis. Stat. § 752.31(2) for one-judge disposition were formerly appealed from county court to circuit court. With the consolidation of the county and circuit courts into a single trial court and the creation of the court of appeals as an intermediate appellate court, it was decided that the former appeals from county courts (which had been decided by a single circuit court judge) would be decided by one court of appeals judge.

Any doubt as to whether a particular case is to be decided by three judges or one judge is resolved in favor of decision by a three-judge panel. *See Waukesha Cnty. v. Genevieve M. (In re Guardianship & Protective Placement of Genevieve M.)*, 2009 WI App 173, ¶ 5, 322 Wis. 2d 131, 776 N.W.2d 640. An error in assigning a case to one judge, instead of to a three-judge panel, is waived absent timely objection. *Id.* ¶ 3 n.3.

The one-judge procedure applies only in the court of appeals. Review in the supreme court is always to the full court.

Appeals in one-judge cases are commenced under the rules for either civil appellate procedure or criminal appellate procedure, depending on the nature of the case. Because these procedures are already discussed elsewhere in this book, this chapter's discussion of one-judge appeals consists largely of cross-references to the appropriate sections in the text. This chapter groups one-judge cases according to whether the civil or criminal procedures apply. The appeal procedures are then briefly described, and significant points are highlighted.

The procedures for appeals in misdemeanor cases or in cases under Wis. Stat. ch. 48, 51, 55, or 938, which are cases decided by one judge pursuant to Wis. Stat. § 752.31, are discussed in chapter 19, *supra*.

This chapter also addresses the procedure for obtaining a three-judge-panel review of a case that would ordinarily be heard by only one judge and discusses the significance of a one-judge versus a three-judge decision.

Finally, the virtually meaningless provision for hearings in county of origin is also discussed.

II. Procedure in Small Claims, Traffic-Regulation, and Municipal-Ordinance Cases [§ 20.2]

Appeals in small claims actions, *see* Wis. Stat. ch. 799, and cases involving traffic-regulation or municipal-ordinance violations are decided by a single court of appeals judge and are commenced in the same way as civil appeals. Wis. Stat. § 809.40(2) prescribes that the appeal period of Wis. Stat. § 808.04(1) (i.e., 45 days if notice of entry of judgment is provided within 21 days after entry, and 90 days if no notice of entry is provided) applies. *See supra* § 5.4. Wis. Stat. § 809.40(2) also states that appeals in these cases are governed by the civil appellate procedures specified in Wis. Stat. §§ 809.01–809.26 and 809.50–809.85, unless Wis. Stat. §§ 809.41–809.42 expressly provide for a different procedure.

As with any appeal, an appeal as of right in these cases may be taken from only a final order or judgment that has been entered in the circuit court. Wis. Stat. § 808.03(1); *see also supra* ch. 4. Note that the notice of appeal must identify the appeal as a one-judge case under Wis. Stat. § 752.31(2). Wis. Stat. § 809.10(1)(b)3. Nonfinal orders may be appealed only with permission. Wis. Stat. § 808.03; *see also supra* ch. 9. The most significant difference between these appeals and ordinary civil appeals is that small claims and traffic-regulation and municipal-ordinance violation cases are decided by one judge. In addition, appeals may be taken from docket entries rather than from a final judgment or order in traffic-regulation and municipal-ordinance violation cases. *See* Wis. Stat. § 808.03(1)(c), (d); *see also supra* § 4.19.

Some minor procedural peculiarities regarding one-judge appeals in these cases are contained in Wis. Stat. §§ 809.41–809.42. As explained in sections 20.4–.7, *infra*, a one-judge case may be changed to a three-judge case either on the motion of a party or on the court's own motion. Wis. Stat. § 809.41. This same rule also allows a party to request that the appeal be heard in the county where the action or proceeding originated. Wis. Stat. § 809.41(4); *see also infra* § 20.5.

Given the creation of the electronic filing (e-filing) system, the former rule requiring multiple copies of briefs has been repealed. Wis. Stat. § 809.43 (2019–20). Whether filed by an e-filer or a paper filer, only one document need be filed. *See supra* §§ 18.3–18.4.

Wis. Stat. § 809.42 provides that the parties may waive oral argument with permission of the court. This is a virtually meaningless rule, however, because oral argument is rarely granted and it is unlikely the court would allow waiver if it deemed oral argument necessary. The rule does raise the question, though, whether there may be a right to oral argument in some one-judge cases. *See infra* §§ 20.5, 20.6 (discussion of hearings in county of origin).

A party filing an appeal in a small claims case should be aware that, although the 45/90-day rule governs the time for filing the notice of appeal, *see supra* § 5.4 (discussing 45/90 rule set forth in Wis. Stat. § 808.04), the 45-day period generally controls because the clerk of small claims court is required by law to give notice of entry of judgment (except in municipal and county forfeiture actions) within 5 days after entry. Wis. Stat. § 799.24(1). This notice shortens the appeal period to 45 days if the notice correctly states the date of entry. *See Mock v. Czemierys*, 113 Wis. 2d 207, 210, 336 N.W.2d 188 (Ct. App. 1983).

Small-claims attorneys should also note that eviction actions, which also fall under Wis. Stat. ch. 799, have a special appeal period. Appeals in eviction cases must be taken within 15 days after the entry of the order or judgment. Wis. Stat. §§ 808.04(2), 799.445. An undertaking in an amount approved by the circuit court is required if a stay is sought pending appeal in an eviction action. Wis. Stat. § 799.445.

Traffic-regulation violations are defined in Wis. Stat. § 345.20(1)(b) as cases under Wis. Stat. ch. 194 (governing motor carriers) or Wis. Stat. chs. 341–349 (motor vehicle code) in which the penalty for violation is a forfeiture. These are noncriminal violations. Wis. Stat. § 939.12. Cases included in the definition of traffic regulation, and thus decided by one judge, are violations of Wis. Stat. § 346.63(2m) (operation of a motor vehicle by a minor with a blood-alcohol concentration of more than 0.0% but less than 0.08%) and violations of any ordinance adopting state traffic regulations pursuant to Wis. Stat. § 349.06. Nonmoving violations generally

are excluded from the definition of traffic regulation, *see* Wis. Stat. § 345.20(1)(b), but are specifically included as one-judge cases under Wis. Stat. § 752.31(2). Appeals of cases involving refusal to submit to a chemical test pursuant to Wis. Stat. § 343.305 are also specified as one-judge appeals. Wis. Stat. § 752.31(2)(c).

The circuit court apparently has authority to condition a stay of execution in traffic-regulation cases upon an undertaking. Wis. Stat. § 345.50(2). The undertaking must not, however, exceed the amount of the maximum forfeiture plus costs. *Id.*

Appeals in cases involving municipal-ordinance violations are also heard by a single court of appeals judge. Wis. Stat. § 752.31(2). If the municipality has created a municipal court, the matter goes first to the municipal court, with a right of appeal to the circuit court (except in the case of a default judgment, *see* Wis. Stat. § 800.14(1)) and a further right to appeal to the court of appeals. The procedure for appealing from municipal court decisions is set forth in Wis. Stat. § 800.14. As with state traffic violations appealable to one judge, municipal-ordinance violations are civil forfeitures. A bond approved by the circuit court must be posted when a party appeals a municipal traffic-regulation case to the court of appeals. Wis. Stat. § 66.0114(2).

III. Procedure in Termination-of-Parental-Rights and Parental-Consent-to-Abortion Cases [§ 20.3]

Wis. Stat. § 809.40(1m) provides that the procedures for appeals in parental-consent-to-abortion cases under Wis. Stat. § 48.375(7) are laid out in Wis. Stat. § 809.105, and those for appeals in termination-of-parental-rights cases under Wis. Stat. § 48.43 are laid out in Wis. Stat. § 809.107. In a case involving adoption, a notice of intent must be filed within 40, not 20, days after entry of judgment, Wis. Stat. § 808.04(7), and in a case involving termination of parental rights, a notice of intent must be filed within 30 days after entry of judgment, Wis. Stat. § 808.04(7m). In all other respects, these cases are governed by the rules set forth for other one-judge appeals. *See supra* § 20.2.

IV. Motion for Three-Judge Panel or Hearing in County of Origin—Wis. Stat. § 809.41 [§ 20.4]

A. In General [§ 20.5]

A case identified in Wis. Stat. § 752.31(2) as a one-judge case may be decided by a three-judge panel upon order of the chief judge of the court of appeals. Wis. Stat. § 752.31(3). If a party requests, a one-judge case may also be heard in the county where the action or proceeding originated. *Id.* These options are mutually exclusive, however, because only one-judge cases may be heard in the county of origin. *Id.*

B. Reasons for Choosing One Judge or Three Judges [§ 20.6]

What is the real significance of the distinction between one-judge appeals and three-judge appeals, and what are the reasons for favoring one approach over the other?

One distinction between one-judge and three-judge appeals is that only one-judge appeals are eligible for a hearing in the county of origin. An appellant who desires such a hearing must make a request by filing a motion for hearing in the county of origin when filing the notice of appeal. Any other party may file such a motion in the court of appeals within 14 days after service of the notice of appeal. Wis. Stat. § 809.41(4).

Until Wis. Stat. § 752.31(3) was revised in 1985, *see* 1985 Wis. Act 29, § 2344m, a party may have wanted a one-judge appeal heard in the county of origin because the law suggested that this was the only type of case in which there might be a right to oral argument. Wis. Stat. § 752.31(3), which deals with disposition of cases, formerly provided that all cases would be "decided" either by one judge or by a three-judge panel except that, when properly requested, the one-judge case would be "heard" in the county of origin. Wis. Stat. § 752.31(3) (1979–80).

Originally, most one-judge appeals were to be orally argued. This can still be seen in the anachronistic provision of Wis. Stat. § 809.42, which allows the parties to waive oral argument in a one-judge case. Wis. Stat. § 752.31 has been amended on several occasions, each amendment reflecting a more restrictive attitude toward oral argument. The 1979 Judicial Council Committee note to Wis. Stat. § 752.31, however, emphasized that those amendments left unchanged the option that, upon timely request, a one-judge appeal "shall actually be heard" in the county of origin.

Notwithstanding this legislative intent, the court of appeals, in practice, refuses to grant oral argument as a matter of right in cases in which a timely motion is made for hearing in the county of origin. When the legislature amended Wis. Stat. § 752.31(3) in 1985, it supported the court's policy by providing that a one-judge appeal "may be heard" (rather than "shall be heard") in the county of origin. *See* 1985 Wis. Act 29, § 2344m. This means that the granting of oral argument now rests entirely in the discretion of the court of appeals and that it is not more likely, and perhaps is less likely, to be granted in a one-judge case than in a three-judge case. The provision for hearing in county of origin is now little more than a relic.

Under the former statute, motions for hearing in the county of origin were to be automatically granted. Present Wis. Stat. § 752.31(3), however, places a heavy burden on the movant to show that (1) the case is deserving of oral argument, and (2) oral argument should be heard in the county of origin. When a motion for hearing in the county of origin is filed as it must be, in the early stages of an appeal, the court of appeals is not prepared to assess either the need for oral argument or whether argument should be heard in the county of origin. Although the court conceivably might take the motion under advisement pending the filing of the briefs to learn more about the issues and merits of the case, it can be anticipated that motions for hearing in county of origin generally will be denied.

Most parties prefer a three-judge panel for a variety of reasons. Parties often believe that a collegial decision will be more thorough than a one-judge decision. The parties also generally assume that the court considers three-judge appeals more important than one-judge appeals and spends more time on them. There may be some validity to these impressions, but any court observer knows that there have been three-judge appeals that have received insufficient consideration, just as there have been one-judge appeals that have been exhaustively considered.

Perhaps the most practical reason for desiring a three-judge panel is that only cases decided by three-judge panels are eligible for publication. *See* Wis. Stat. § 809.23(1)(b)4. Thus, the best basis for a motion for a three-judge panel is that the appeal presents issues warranting publication under Wis. Stat. § 809.23(1)(a)—that is, for example, that the case raises an issue of first impression, contributes to the legal literature, presents or resolves a conflict between decisions, or is of substantial public interest. *See* Wis. Stat. § 809.23(1)(a); *see also supra* § 17.2.

C. Procedure for Requesting Three-Judge Panel [§ 20.7]

A motion for a three-judge panel may be filed in appeals as of right, in petitions for leave to appeal nonfinal orders, and in petitions for supervisory writs or to commence an original action. Wis Stat. § 809.41(1). The motion must be filed along with the notice of appeal or petition, or, if filed by another party, within 14 days after service of the notice or petition or with the response to the petition. *Id*.

If the state is a party, the motion for a three-judge panel must be served on the attorney general, who generally represents the state if the motion is granted. *Id.* The attorney general may file a response to the motion within 11 days after service. *Id.* Any other party may also respond to the motion within the same time period. Wis. Stat. § 809.14(1). There is a five-day response period in termination-of-parental-rights appeals. Wis. Stat. § 809.14(1m).

Failure to timely file a motion for a three-judge panel waives the right to request a decision by a three-judge panel. Wis. Stat. § 809.41(1)(e). It is rare for a statute to specifically state that failure to meet a time period constitutes waiver, so it is unlikely the court would grant a motion to extend the time for filing a motion for a three-judge panel.

The motion itself must provide the court with the factual and legal underpinnings necessary to understand the need for a three-judge panel. Conclusory allegations that the appeal presents issues of statewide importance or worthy of publication are insufficient. The issues must be identified and clearly defined. A brief factual outline of the case and how the issues arose is usually necessary to give meaning to the issues.

The decision on the motion for a three-judge panel is made by the chief judge, who may act ex parte. Wis. Stat. § 752.31(3). A decision on the motion is usually delayed, however, to permit the adverse party to respond.

The chief judge may change or modify the decision on the motion at any time before the decision on the merits of the appeal or petition. Wis. Stat. § 809.41(2). Before a decision on the merits, the chief judge may also order that an appeal be heard by a three-

judge panel even if no motion for a three-judge panel has been filed. Wis. Stat. § 809.41(3). This usually occurs when the judge who has been assigned to write a one-judge opinion identifies the case as raising issues worthy of publication. If this judge persuades the other judges on the panel that the case warrants three-judge treatment, the panel, acting through a staff attorney, orally requests the chief judge to grant a three-judge panel. Such requests by the panel are always granted, and the order setting the case for decision by a three-judge panel will state that the order is on the motion of the particular panel.

Examples of cases in which a three-judge panel has been ordered can be found by looking for published opinions in juvenile, small-claims, traffic-regulation, and other cases that would normally be decided by one judge. An example is *State v. Strassburg*, 120 Wis. 2d 30, 33 n.1, 352 N.W.2d 215 (Ct. App. 1984) (ordering three-judge panel in case concerning constitutionality of habitual-traffic-offender statute).

Supplement Chapter 21
Internal Operating Procedures:
Court of Appeals

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

Chapter 21
Internal Operating Procedures: Court of Appeals

I. Scope [§ 21.1]

Internal operating procedures of the court of appeals serve two primary functions. The first is to provide the court with a ready reference to procedures for considering, processing, and disposing of matters before the court, with an eye to promoting uniformity and discouraging the four districts of the court from developing disparate procedures. However, in the interests of the effective administration of justice, the court may, in its discretion, direct that a different or modified procedure be followed as to any particular matter before the court.

The second function of the internal operating procedures is to open the often mysterious world of the court to members of both the legal profession and the public at large. In this regard, the internal operating procedures serve both an educational and a public relations function.

The introduction to the internal operating procedures states:

> The Court of Appeals uses these internal operating procedures for processing, considering, and disposing of matters pending before the court pursuant to applicable statutes and rules. *In the interests of the orderly and efficient administration of justice, the court, in its discretion, may direct that a different or modified procedure be followed as to any particular matter pending before the court. These procedures may be periodically modified as experience and necessity dictate.* The constitutional and statutory provisions with reference to the Court of Appeals mandate that it function as a single court under a Chief Judge and not as four separate courts.

The procedures as set forth below begin with a discussion of court personnel, then go into the actual decision-making process.

Note. The text in the remainder of this chapter reprints the text of the internal operating procedures of the Wisconsin Court of Appeals (as revised Nov. 30, 2009, with a 2021 update to the docketing statement procedures noted in section 21.30, *infra*). The outline structure, however, has been altered slightly for the purposes of this book. For the official outline numbering and structure of the internal operating procedures, and for any updates, readers should consult the website of the Wisconsin Court System, at https://www.wicourts.gov/ca/IOPCA.pdf.

II. Personnel [§ 21.2]

A. Chief Judge [§ 21.3]

The Chief Judge is responsible for the administration of the court.

B. Deputy Chief Judge (SCR 70.37) [§ 21.4]

The Chief Judge of the Court of Appeals shall appoint a Deputy Chief Judge to serve under the Chief Judge. The Deputy Chief Judge shall serve at the pleasure of the Chief Judge. The Deputy Chief Judge shall provide assistance to the Chief Judge in administrative areas requiring the participation by a judicial officer. The Chief Judge may delegate any of the Chief Judge's duties and authority as Chief Judge to the Deputy Chief Judge.

C. Administrative Assistant to the Chief Judge [§ 21.5]

The administrative assistant to the Chief Judge performs the duties assigned by the Chief Judge. Those duties consist, in part, of communicating and implementing orders and directives of the Chief Judge made in the discharge of his or her administrative duties and responsibilities.

The administrative assistant to the Chief Judge shall cooperate with the clerk, the chief deputy clerk, the chief staff attorney of the Court of Appeals, and the fiscal officer of the Supreme Court to efficiently dispose of the court's work.

D. Presiding Judge [§ 21.6]

Each Presiding Judge is responsible for the management of the case flow of appeals and proceedings originating in the district in which the Judge presides. The Presiding Judge supervises and controls the preparation of all appeals and proceedings coming before his or her district.

The Presiding Judge is appointed by the Chief Judge for a two-year term, commencing August 1 of odd numbered years.

With the approval of the Chief Judge, the Presiding Judge may temporarily assign a law clerk and/or a judge's secretary to another judge if necessary to efficiently dispose of the district's workload.

The Presiding Judge exercises continuous leadership in management of the court's case assignment and processing system and initiates development of policy concerning the court's internal operations. The Presiding Judge schedules the screening, preargument, oral argument, decision, opinion and motions conferences, and assigns cases for disposition and opinion pursuant to Article VI. The Presiding Judge also directs the cases and other matters to be considered at the conferences and further directs the administrative assistant as to the assignment of cases for disposition.

The Presiding Judge supervises any staff attorney assigned to a district who is not a member of the central staff.

Whenever possible, Presiding Judges conduct the work of the panel in a manner that will make one judge available within the district during normal court hours.

E. Clerk [§ 21.7]

The clerk shall perform the duties of the office prescribed by law and shall perform such additional duties prescribed by the court or the Chief Judge and shall aid the Chief Judge in the performance of his or her administrative responsibilities.

The clerk is responsible for the constant monitoring and supervision over cases from the time of appeal or commencement of proceedings until ultimate disposition. The clerk dockets and monitors to assure the prompt, proper, and timely compliance with the appellate procedure. The clerk's office informs a staff attorney for each district of those cases which the appellants have identified as being entitled by statute or rule to be given preference by the court. Noncompliance with the appellate procedure is referred to a staff attorney for appropriate action.

The clerk has custody of the records and papers of the court and shall not permit any original record or paper to be taken from the custody of employees of the Court of Appeals, except as authorized by the orders or instructions of the Supreme Court, the Chief Justice, the Court of Appeals, its Chief Judge or a Presiding Judge.

The clerk files and dockets the decisions and opinions of the court. Upon filing, the clerk, through a district secretary, notifies parties as to the court's decision and releases the opinions to the parties.

The clerk dockets and issues all orders of the court. Other than routine or delinquency notices or orders, all orders contain the name or names of the deciding judge or judges but are not signed by a judge or judges.

The clerk gathers statistics with respect to the business of the court and supplies them to the Chief Judge, Presiding Judges, the chief staff attorney, and, as requested, the director of state courts, and to such other judges of the Court of Appeals who request them.

The clerk shall cooperate with the chief staff attorney and the administrative assistant to the Chief Judge to efficiently dispose of the court's work.

F. Chief Deputy Clerk [§ 21.8]

The chief deputy clerk performs such duties as are assigned by the clerk and, in the absence of the clerk, performs all of the duties of the clerk. The chief deputy clerk shall cooperate with the clerk, the chief staff attorney, and the administrative assistant to the Chief Judge to efficiently dispose of the court's work.

G. Central Legal Staff [§ 21.9]

Central staff attorneys serve the court as a whole; their responsibilities are institutional. Their primary function is to provide professional assistance as house counsel to the judges in efficiently, expeditiously, and effectively processing matters pending before the court to and through the decision-making stages. The central legal staff is headed by the chief staff attorney.

H. Chief Staff Attorney [§ 21.10]

The chief staff attorney performs the duties assigned by the court and the Chief Judge. Under the supervision of the Chief Judge, (s)he supervises and directs the work of the central staff attorneys, assigns staff attorneys to the appeals and proceedings originating in a specified district, and equalizes the workloads of the staff attorneys.

The chief staff attorney is the legal advisor to the clerk of the court. He or she assists the clerk in establishing procedures for: docketing and monitoring appeals and proceedings; record storage, handling and transmittal; taxing costs; filing opinions and decisions; and gathering court statistics.

To the extent feasible, within one week after an appeal record is transmitted to the court, the chief staff attorney endeavors to determine whether the court has jurisdiction. If he or she believes that the court is without jurisdiction or if an examination of the record raises a doubt as to whether the court has jurisdiction, he or she will immediately contact the Presiding Judge or motions judge of the appropriate district. The court may issue an order advising the parties of the jurisdictional problem and request that the

parties submit memoranda addressing the issue in a specific form and time period. If jurisdiction is clearly lacking, the court may immediately dismiss the appeal.

The chief staff attorney is not assigned to a particular district but shall, consistent with the time necessary to discharge his or her duties as chief staff attorney, assist with the staff workload of the various districts as deemed necessary by the chief staff attorney or as directed by the Chief Judge.

The chief staff attorney constantly monitors the work of the central staff attorneys to assure that it is expeditiously performed and that governing criteria are uniformly applied.

The chief staff attorney reviews the opinions not recommended for publication by the panels to determine whether they should be recommended for publication. The chief staff attorney prepares his or her recommendations and suggestions and submits them to the publication committee. In the interests of establishing a unified appellate system, doctrinal inconsistencies in panel decisions are immediately reported to the Chief Judge to the end that the Chief Judge may be informed.

The chief staff attorney shall cooperate with the clerk, the chief deputy clerk, and the administrative assistant to the Chief Judge to efficiently dispose of the court's work.

I. Central Staff Attorneys [§ 21.11]

Central staff attorneys are the staff attorneys who work under the supervision of the chief staff attorney in the central office located in Madison. Each central staff attorney has the initial responsibility for staff work performed for the district to which he or she is assigned and performs such staff work for other districts as assigned by the chief staff attorney.

Central staff attorneys perform such additional work as assigned by the chief staff attorney. Central staff attorneys regularly prepare (for appeals and proceedings assigned to them) memoranda and recommendations with respect to: requests for extension of time; motions (procedural or substantive); requests that an appeal be heard by a three-judge panel; supervisory writs; petitions for leave to appeal; motions for relief pending appeal; and inmate petitions. Central staff attorneys also prepare drafts of orders, no merit and per curiam opinions.

Central staff attorneys shall advise the Chief Judge and the Presiding Judges of the existence of pending appeals or proceedings within one panel or the several panels that afford the prospect of doctrinal inconsistency when such cases come to their attention.

J. District Staff Attorneys [§ 21.12]

District staff attorneys are staff attorneys located in a district office rather than the Madison central office. They are supervised by the Presiding Judge of their district. District staff attorneys perform research and prepare drafts of per curiam opinions and orders for their respective panels. District staff attorneys also prepare memoranda and recommendations regarding motions and petitions in the event the matter can be handled more expeditiously in the district office. District staff attorneys also administer the expedited appeals program in their respective districts under the supervision of the Chief Judge and the Presiding Judge. In addition, they shall perform such other tasks as are assigned by the Presiding Judge.

K. Law Clerks [§ 21.13]

A law clerk serves as a personal professional assistant to a particular judge and performs such tasks as are assigned by that judge. A law clerk may be temporarily assigned to another judge by the Presiding Judge, with the approval of the Chief Judge, for a short duration or for a particular matter. A law clerk's work normally includes legal research, memorandum drafting, citation checking, editorial work, and opinion review.

III. Decisional Process [§ 21.14]

A. Screening [§ 21.15]

Screening is the procedure whereby each case is examined briefly, prior to its being considered on the merits, by the deciding judges for the purpose of routing it through the appropriate decisional process. Following filing of briefs, the Presiding Judge schedules a screening conference for members of the panel. At conference, a case is routed for: (1) summary disposition; (2) submission on briefs, without oral argument; (3) oral argument; (4) consolidation or consideration on the same calendar; or (5) certification to the Supreme Court. One-judge appeals are identified and assigned by the Presiding Judge. Screening conferences may be conducted immediately prior to or in conjunction with the decision conference. Expedited appeals conferences are held within 7 days of receipt of the final briefs.

With respect to determining whether briefs are adequate or whether oral argument is to be called, the court applies the oral argument criteria, Wis. Stat. Rule 809.22, after analyzing the briefs and considering the parties' statements regarding oral argument, Wis. Stat. Rule 809.19(1)(c). Whenever the workload of the panel permits, it favors oral argument. For oral argument cases, parties may be limited to specific areas or directed to discuss matters omitted or not adequately discussed in briefs. The court may limit the length of argument.

Cases identified for summary disposition by the court on its own motion, Wis. Stat. Rule 809.21(1), are decided by the panel, upon review of the briefs and the record, following screening, and assigned to staff attorneys for preparation of an order implementing the court's decision. The order will identify the case, the deciding judges, the ultimate result or disposition, and the reasons for the result. A draft order is submitted to the panel for final decision. If the panel decides that the case should not be disposed of summarily, the case is routed for decision on briefs.

A case may be disposed of summarily by order if the panel unanimously agrees on the decision; unanimously agrees the issues involve no more than the application of well-settled rules of law or the issues are decided on the basis of unquestioned and controlling precedent or the issues relate to sufficiency of evidence or trial court discretion and the record clearly shows sufficient evidence or no abuse of discretion; and the issues may be resolved by merely stating the reasons for the decision without a detailed analysis. In addition, any appeal or other proceeding may be disposed of summarily if requested by the parties, if necessary for the sound and efficient administration of justice, or if otherwise required in the interests of justice.

Appeals or other proceedings decided by one Court of Appeals judge may be disposed of summarily under this procedure.

Joint or simultaneous calendaring and consolidating of cases where appropriate may be ordered by the Presiding Judges so as to lessen the potential for conflict. Cases that require the making of new law or that present major issues of public policy may be considered for certification.

If a judge determines that (s)he should be disqualified, the Presiding Judge advises the Chief Judge so that another judge or a reserve judge may be assigned.

B. Assignment of Cases to Submission Calendars [§ 21.16]

The Presiding Judge organizes a submission calendar or calendars as promptly and frequently as the case flow permits. Except in unusual circumstances, cases will be calendared for submission or oral argument within 45 days of receipt of the last brief. The calendars are balanced as well as possible to achieve speedy submission of cases that do not require oral argument, and at the same time avoid undesirable delay in the orderly submission of cases requiring oral argument. At the direction of the Presiding Judge, a designated secretary assigns cases to the calendars for disposition. When possible, and without undue delay in civil cases, preference is given to expedited and criminal appeals and appeals required by statute to be given preference. Cases not given preference are placed upon the calendar in the order that they are ready for submission.

Oral argument cases may be withheld from calendaring as necessary for limited periods to efficiently calendar cases to be heard in locations required by Wis. Stat. §§ 752.15, 752.17 and 752.19.

For oral arguments, the notice provides the date, place and time; the length; and any special instructions relating to the oral argument.

C. Motions and Petitions for Leave to Appeal [§ 21.17]

(a) The motions judge is the judge designated by the Presiding Judge to hear motions. In the event the motions judge is not available, any other judge may consider a motion. The Presiding Judge may designate himself or herself to act as the motions judge.

(b) Motions are filed with the clerk. Motions for procedural orders may be acted upon without response. Motions for procedural orders[,] which usually do not adversely affect the opposing party, such as to file a brief in excess of the maximum number of pages, may be acted upon directly by the clerk, in consultation with the chief staff attorney. As necessary, the clerk or the chief staff attorney will consult the motions judge of the appropriate panel. The opposing party may be invited to file a response. A party adversely affected by the granting of a procedural motion without a response may move for reconsideration. Wis. Stat. Rule 809.14(2).

(c) The motions judge may act on all motions, except those that reach the merits or preclude the merits from being reached, which can only be acted on by the panel. The motions judge may direct that any motion be acted on by the panel. The panel considers motions that reach the merits, that preclude the merits from being reached, or that have been referred by the motions judge. The panel considers these motions at regularly scheduled or specially called motions conferences. Motions conferences may be by telephone and may include the staff attorney. The panel may direct that a motion be heard at oral argument. As provided in IOP VI(12)(b) [*see infra* § 21.26], any motion in a one-judge appeal, including one which reaches the merits or which precludes the merits from being reached, shall be decided by the motions judge.

(d) Procedural motions for which responses have been invited, procedural motions adversely affecting the opposing party, motions for reconsideration of procedural orders, and all substantive motions, together with responses and supporting and opposing memoranda and papers, are reviewed by a staff attorney. The staff attorney discusses the motions with the motions judge. Staff attorneys prepare motions memoranda or oral presentations with recommendations and a proposed order for each motion to be submitted to the panel and for any other motion as directed by the motions judge. Staff attorneys will usually draft all orders following the court's decision.

(e) *Petition for Leave to Appeal*. Wis. Stat. § 808.03(2); Rule 809.50. Petitions for leave to appeal are filed with the clerk. Staff attorneys review all petitions, responses, and supporting memoranda and prepare motions memoranda analyzing the request. The papers and memoranda are circulated to the deciding judges for consideration at a motions conference. As provided in IOP VI(12)(b) [*see infra* § 21.26], a petition for leave to appeal in a one-judge appeal shall be decided by one court of appeals judge. Any requests for temporary relief must be included with the petition. Parties seeking temporary relief should petition a specific judge of the appropriate panel, pursuant to Wis. Stat. Rule 809.52, only when immediate (less than 24-hour) relief is required. For all other situations, staff attorneys advise the Presiding Judge of the request for temporary relief. The Presiding Judge, or his or her designee, may grant the relief upon the terms and conditions deemed appropriate. Staff attorneys draft the implementing order to be issued by the clerk. This procedure is intended to assure efficient court operations, efficient consideration of the petitions, and the least expensive procedure for the parties and their attorneys.

(f) *Motions for Relief Pending Appeal*. Motions for relief pending appeal are decided by the motions judge, unless the relief requested reaches the merits, in which event the motion is decided by the panel. If relief is requested pending consideration of the motion, staff attorneys advise the Presiding Judge. The Presiding Judge, or his or her designee, may grant the relief upon terms and conditions deemed appropriate. Staff attorneys draft the implementing order to be issued by the clerk. Parties seeking relief pending consideration of the motions should only approach a specific judge of the panel if immediate (less than 24-hour) relief is required.

(g) *Petitions to Intervene*. Petitions to intervene are referred to staff attorneys, who will advise the motions judge. The motions judge may act on the petition or direct that it be considered by the panel. Staff attorneys prepare motions memoranda for each petition to be submitted to the panel and for any other petition as directed by the motions judge.

(h) *Delinquency Proceedings*. If any item required to be filed by the Rules of Appellate Procedure is not filed, the clerk will issue a delinquency notice informing the parties that unless the item or a motion seeking an extension of time showing good cause is filed within a specified time, in the case of a filing by the appellant, the appeal will be subject to dismissal or, in the case of a filing by the respondent, the appeal would be submitted for summary disposition, including possible summary reversal. If the party does not comply with the delinquency notice, in the event of a filing by appellant, the court may consider the appropriate sanction under Wis. Stat. Rule 809.83(2), including dismissal; in the event of a filing by the respondent, the appeal is submitted for summary disposition. If, in response to the delinquency notice, a motion for extension of time or other response is filed, the clerk may grant a limited

extension if good cause is shown or submit the motion to staff attorneys for presentation to the motions judge. If the motion for extension of time is denied, the appeal will either be dismissed or submitted for summary disposition.

D. Submission [§ 21.18]

(a) Upon calendaring, the clerk delivers any pertinent papers not previously delivered to the panel. The case record and briefs are delivered prior to screening.

(b) Each judge who is to participate in deciding an appeal reads the briefs and becomes familiar with the record, the parties' contentions, and the principal authorities relevant to the questions presented.

(c) If a case is to be orally argued, each judge familiarizes himself/herself with the case before the preargument conference. The panel confers in advance of argument to identify the issues needing exploration and to plan its questioning of counsel. If not already specified in the notice of oral argument, the Presiding Judge, or other member of the panel, may suggest to counsel at the opening of the argument the matters to which the panel desires argument to be directed.

At oral argument, parties must limit their argument to issues or questions specifically noticed to them by the court. If the court has not limited the scope of the argument, the parties are expected to supplement and clarify arguments submitted in the briefs. Parties should discuss any developments in the law subsequent to the filing of their briefs. At the close of oral argument, attorneys who requested oral argument are expected to have justified that request.

Tentative decision conferences are held as soon as possible following oral arguments.

(d) On briefs cases are decided by the panel at a decision conference scheduled by the Presiding Judge. The parties will be notified when the cases are taken under submission.

(e) Tentative decisions can be revised, altered, or reversed throughout the decisional process until an opinion is filed.

(f) At the request of any member of the panel or of any party, oral arguments will be preserved by tape recordings. A judge who is to participate in the decision-making process, but who is unable to attend oral arguments, shall listen to the tape recording of the arguments prior to participation in the decision conference.

(g) The process by which a tentative decision is formulated may appropriately vary from these provisions but all participating judges should join in formulating the opinion. Every decision names the judges who participated in it. Decisional conferences are held by personal attendance. However, when the judges are separately headquartered, they may appropriately exchange views by memoranda or telephone, unless the complexity of the matter under consideration makes those forms of communication inadequate.

(h) The judge responsible for the panel's opinion or memorandum is assigned at the decision conference and preparation of the opinion or memorandum commenced as soon as possible. The average time for rendering a decision should not exceed 40 days, and the maximum time for any case, except one of extraordinary complexity, should not exceed 70 days. Variation from the standard is permitted when necessary to accommodate special problems in individual cases and fluctuations in the flow of the panel's work.

(i) After a tentative decision is reached, the case is assigned by lot to a judge for the writing of an opinion. In the event the opinion is assigned to a judge representing the minority view, the opinion will be reassigned by lot to a member of the majority. After the tentative decision is reached, if the panel unanimously agrees on the decision and unanimously agrees that the resulting opinion should not be published pursuant to the criteria of Wis. Stat. Rule 809.23(1)(b) or that the resulting opinion will address and clarify solely an issue of appellate jurisdiction or procedure, the case may be assigned for a per curiam opinion. Such a case will be assigned by lot to a judge who will be responsible for the per curiam opinion.

E. Opinions [§ 21.19]

(a) *Form*. The panel's decision and opinion is given in a form appropriate to the complexity and importance of the issues presented in the case. In cases involving new or unsettled questions of general importance, a full written opinion reciting the facts, the questions presented, and analysis of pertinent authorities and principles is rendered. Cases not involving such questions are

decided by memorandum or per curiam opinion. A memorandum or per curiam opinion may reduce or omit the statement of facts and give only the reasons for the decision with a minimal analysis of the reasoning. Every decision is supported, at minimum, by a citation of the authority or statement of grounds upon which it is based. When the trial court's decision was based upon a written opinion or a statement upon the record of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the trial court's opinion or statement of grounds, or make reference thereto, and affirm on the basis of that opinion. All judges participating in a decision are identified in the opinion but do not sign the opinion. Immediately preceding the opinion writer's name, the opinion will read: "Before _____, P.J., _____ and _____, JJ." As examples: "Before Cane, C.J., Hoover, P.J., and Peterson, J."; "Before Nettesheim, P.J., Brown and Snyder, JJ."; "Before Vergeront, P.J., Wedemeyer, J., and William Eich, Reserve Judge."

(b) The assigned judge writes and circulates to the panel a proposed opinion based on the tentative decision. Judges are responsible for the preparation of all opinions.

(c) The panel reviews the proposed opinion. If all the deciding judges concur, the opinion becomes final. If a deciding judge thinks changes are necessary or disagrees with the decision, (s)he informs the opinion writer, preferably prior to opinion conference. The opinion writer may accept some or all of the suggestions. If substantial changes are made, the rewritten version is circulated.

(d) The deciding judges shall confer to consider unapproved opinions. Only those parts of the proposed opinion that produced differences among the judges are discussed. If a further rewriting is required, the opinion is recirculated and reconsidered.

(e) Following a written request from the author of an opinion, judges shall either approve of the opinion or file their dissent or concurrence within 5 days. Dissenting and concurring opinions are circulated to all the deciding judges.

(f) For a case assigned for a per curiam opinion, the judge assigned to the case supervises the preparation of the proposed opinion. The judge may rely on staff attorneys for assistance in drafting the opinion. If all three deciding judges agree with the disposition and reasons therefor, the per curiam opinion is released. As with authored opinions, judges are responsible for the preparation of all opinions.

(g) Each district shall designate a specific day of the week for release of its decisions and opinions. Unanimous opinions are filed with the clerk upon completion. Majority opinions, concurrences, and dissents are filed with the clerk together, following the 5-day period for preparing concurrences and dissents. All opinions and decisions are released to the parties and the public on the release day. The clerk, through a district secretary, notifies the parties as to the court's decision and releases opinions to the parties.

Before release, the decisions and opinions are delivered to the clerk along with a tentative list of the decisions and opinions to be released. The tentative opinion list is made available to the public upon receipt by the clerk but in no event will the list be made available more than 5 days before actual release. The clerk dockets and files the opinions on the indicated release dates.

(h) A panel or judge may appropriately render oral opinions from the bench in cases that are orally argued. Oral decision should be made only if the panel or judge making the decision is thoroughly acquainted with the briefs and record before argument and has the opportunity to defer decision if there is any doubt about the decision or the propriety of it being rendered orally. The oral decision shall be recorded, transcribed, and filed as the written decision, pursuant to Wis. Stat. § 752.41(1).

(i) When desirable for the purpose of maintaining doctrinal consistency, the proposed opinion draft may be circulated to members of another panel considering or about to consider a similar case. Opinions are promptly delivered to each member of the publication committee.

(j) A decision other than affirmance, or reversal with directions to render judgment for the appellant, states what course of action is to be followed in the court below and the rules to be applied therein so far as they are within the issues decided.

F. Reconsideration [§ 21.20]

When a party files a motion for reconsideration under Wis. Stat. Rule 809.24(1), the clerk's office shall send a copy of the motion to the judge who wrote the opinion or to the supervising judge. The clerk's office shall also submit the motion to a staff attorney who will be responsible for coordinating the disposition of the motion.

The court may order that a response to the motion be filed. The court may either amend the underlying decision or order or issue an order denying the motion for reconsideration. The court may also deny the motion for reconsideration without ordering that a response be filed. In every instance, the court will issue an appropriate order.

G. Publication [§ 21.21]

(a) The opinion writer may make a recommendation to the deciding judges whether the opinion should be published. The deciding judges shall make a final recommendation to the publication committee regarding publication. The panel's recommendation regarding publication is inserted following the decision as the final line on the panel's opinion. A copy of the filed opinion with the panel's publication recommendation is distributed to the Chief Judge, the judges designated by each panel to sit on the publication committee, and the chief staff attorney.

(b) The judge selected by the Court of Appeals judges of each district shall represent that district on the publication committee. The judge is expected to consult with the judges of the district regarding publication prior to the publication conference.

(c) The chief staff attorney, after consultation with the staff attorneys, may prepare a memorandum analyzing the publication position taken by the parties in their briefs, potentially conflicting opinions from other panels, and recent applicable pronouncements by the United States and Wisconsin Supreme Courts. Publication memoranda are distributed to the publication committee.

(d) The Chief Judge or his or her designee calls a monthly publication conference at which the publication committee makes a determination as to which opinions should be published. At the conference, the committee considers all opinions reviewed under this procedure to date. Opinions are published upon a majority vote of the committee.

(e) After the publication decision is made, the court issues an appropriate publication order. The publication order will name the judges who made the publication decision. Opinions for publication are delivered to the court's publication clerk for processing to the official reporters and the State Bar of Wisconsin. By definition, the court's summary disposition orders and memorandum opinions are within the nonpublication criteria of Wis. Stat. Rule 809.23(1) because they speak for the court and are unsigned. For this reason the court's publication orders will not include summary disposition orders and memorandum opinions.

H. Remittitur [§ 21.22]

Following the decision and the filing of the opinion, the district office returns the record to the clerk. The clerk remits the record pursuant to Wis. Stat. Rule 809.26. In the event that the Court of Appeals decides to reconsider the case, the clerk returns the record as needed to the district office. Prior to remitting, the clerk taxes costs and fees pursuant to Wis. Stat. Rule 809.25.

I. Remand from Supreme Court [§ 21.23]

When the Supreme Court remands a case to the Court of Appeals for further proceedings, the matter is referred to the appropriate panel of judges. The panel may direct that oral arguments be heard or may proceed to consider the Supreme Court's opinion and take the necessary action at a regularly or specially called conference.

J. Petitions for Supervisory Writs and Original Jurisdiction Prerogative Writs [§ 21.24]

(a) Petitions and supporting memoranda for supervisory writs and original jurisdiction prerogative writs are filed with the clerk. Any requests for temporary relief must be included with the petition. The clerk delivers the petition and supporting memoranda to the staff attorney for the appropriate district. The staff attorney reviews the petition and reports to the motions judge for the appropriate district. The motions judge may order that a response be filed and/or that temporary relief be granted. The staff attorney prepares the appropriate order to be issued by the clerk. When a response is ordered, the order shall set forth the time by which the response must be filed. The order may also specify the terms and conditions of any temporary relief granted. The court may also deny a petition ex parte. If the petition is filed in a three-judge appeal, the decision to deny a petition ex parte shall be made by a three-judge panel. As provided in IOP VI(12)(b) [*see infra* § 21.26], a petition for supervisory writ or an original jurisdiction prerogative writ filed in a one-judge appeal shall be decided by one court of appeals judge.

(b) Responses are filed with the clerk. The clerk delivers the response and any supporting documents and memoranda to the staff attorneys. The staff attorneys analyze the issues raised in the petition and submit to the panel a petition memorandum describing the nature of the issue. The memorandum, together with all the petition papers, is delivered to the panel prior to the court's consideration. The panel acts on the petition at a motion conference. The panel may direct that the petition be heard at oral argument. The staff attorney drafts an appropriate order implementing the court's decision, to be approved by the panel and issued by the clerk.

(c) Parties seeking temporary relief should petition a specific judge of the appropriate panel, pursuant to Wis. Stat. Rule 809.52, *only* when immediate (less than 24-hour) relief is required. For all other situations, parties should file their request with the clerk. The central staff attorney assigned to the district reviews the request and reports it to the Presiding Judge, or his or her designee, as described above. This procedure is intended to assure efficient court operations, efficient consideration of the petitions, and the least expensive procedure for the parties and their attorneys.

K. No Merit Reports [§ 21.25]

If a no merit report is submitted without the certification required by Wis. Stat. Rule 809.32(1)(c), the clerk's office shall not accept the report for filing. The clerk's office shall inform the attorney of the omission and request the submission of an amended no merit report. If an amended no merit report is not filed within the time set of the clerk, the matter will be submitted to the staff attorney office for further action.

A staff attorney reviews the no merit report, the defendant's response, if one is filed by the defendant, the supplemental no merit report, if any, and the case record. The staff attorney submits to the appropriate judge or panel an independent recommendation as to whether the no merit report should be accepted, held in abeyance pending further action, or rejected. If the staff attorney recommends to accept the no merit report and if the judge or panel accepts the recommendation, the staff attorney will draft a proposed per curiam opinion or summary order affirming the matters appealed from and relieving the attorney of further responsibility on appeal. If the staff attorney recommends that the no merit report be held in abeyance pending further action or that the report be rejected, the staff attorney will draft the appropriate proposed order to implement the recommendation. The proposed opinion or order is circulated to the deciding judge or panel for consideration and approval. No merit reports are only accepted upon a unanimous vote of the deciding judges.

If a defendant files a response to a no merit report, and the attorney does not file a supplemental no merit report under Wis. Stat. Rule 809.32(1)(f), the court may order the attorney to do so, if appropriate under the facts of the case and necessary to the court's disposition of the appeal.

L. One-Judge Appeals [§ 21.26]

(a) For appeals of cases specified in Wis. Stat. § 752.31(1), a motion for a three-judge panel or for the appeal to be heard in the county of origin must be filed as required by Wis. Stat. Rule 809.41. Upon receipt, the clerk will notify the parties that the motion will be held in abeyance until the last brief has been filed. After the last brief has been filed, the clerk shall submit the motion and a copy of the briefs to a staff attorney. The staff attorney shall review the motion and briefs, and consult with a panel for the district in which the motion is filed. The panel shall determine whether the appeal warrants consideration by a three-judge panel. The staff attorney shall communicate the panel's determination to the Chief Judge who directs that an order be issued either granting or denying the motion. If the motion is granted, the clerk notifies a district secretary of the appropriate panel, and the appeal proceeds under the procedures for three-judge appeals. As with three-judge appeals, the clerk will notify the parties of the date of submission.

(b) Motions and petitions in appeals of cases specified in Wis. Stat. § 752.31(2), are decided by one Court of Appeals judge.

M. Indigency [§ 21.27]

If a person seeking to proceed in the Court of Appeals claims to be indigent, that claim will be accepted if an indigency determination as to that person has been previously made in the Court of Appeals or in the circuit court, except that if the court of appeals has reason to believe that the person's circumstances have materially changed since his or her last indigency determination,

the court may request that the person complete a new affidavit of indigency. In addition, the court of appeals may request that the person complete a new affidavit of indigency if more than one year has passed since the person last filed an affidavit of indigency with the court of appeals. If no indigency determination has been previously made, the clerk sends the person an affidavit of indigency to be completed and returned. The affidavit is accompanied by a form order requiring completion and filing of the affidavit within 10 days of the date of the order or, failing which, ordering the dismissal of the proceeding.

The clerk makes indigency determinations based upon monetary guidelines established by the court. If the person is determined to be indigent, the clerk issues an order waiving payment of the filing fee in the proceeding. If the affidavit of indigency is incomplete or is not credible, the clerk issues an order stating that the affidavit of indigency is incomplete or is not credible, or the reasons for which the affidavit is deemed incredible, stating that the affidavit is not approved, and requiring the person either to pay the appropriate filing fee or submit a credible and completed affidavit within five days of the date of the order, failing which the proceeding will be dismissed.

If the clerk determines on the basis of a complete and credible affidavit that a person is not indigent, the clerk issues an order directing the person to pay the appropriate filing fee in the proceeding. If the person does not respond to a court order concerning indigency, the clerk assigns the matter to a staff attorney for review and reporting to the court, with recommendations for the disposition thereof.

IV. Expedited Appeals [§ 21.28]

A. Eligible Cases [§ 21.29]

All appeals in the Court of Appeals shall be eligible for the expedited appeals program except for the following: (1) appeals brought under Wis. Stat. § 809.105; (2) appeals brought under Wis. Stat. § 809.107; (3) no merit appeals brought under Wis. Stat. Rule 809.32; (4) appeals brought under Wis. Stat. § 974.06(7); (5) appeals in which a party represents himself or herself; and (6) appeals brought under Wis. Stat. Rules 809.30 or 809.40(1) except for cases arising under chs. 48, 51, 55, or 938.

B. Docketing Statement [§ 21.30]

(a) In all eligible cases, the appellant shall file in the Court of Appeals an *original and one copy* of a completed docketing statement and serve one copy of the completed docketing statement on each respondent. The completed docketing statement shall be submitted along with the notice of appeal sent to the Court of Appeals by the appellant, pursuant to Wis. Stat. Rule 809.10(1)(a). The respondent need not fill out a docketing statement but may file a response as outlined in paragraph (2)(e). Filing of the docketing statement with Court of Appeals constitutes certification of service on the respondents. Wis. Stat. Rules 809.80(2) and 801.14(4). The respondents must therefore be provided with a completed docketing statement by the appellant.

2021 Update: the docketing statement must be filed electronically in the circuit court when the notice of appeal is filed in the circuit court. *See* Wis. Stat. Rule 809.10(1)(d). Electronic filers in the circuit court are served through the electronic filing system, but paper parties must be served using traditional methods. *See* Rule 809.10(1)(h). The docketing statement, Form AP027, is available online at https://www.wicourts.gov/forms1/appeals.jsp?Category=59.

(b) The statement must be fully filled out and must accurately describe the jurisdictional facts, nature of trial court proceedings, issues on appeal, and standards of review applicable to those issues. Failure to include any matter in the docketing statement does not constitute a waiver. The court may, however, impose sanctions on counsel or appellant if it appears that available information has been withheld. Wis. Stat. Rule 809.83(2). The appellant must attach to the docketing statement a copy of the judgment or order appealed from and any findings of fact, conclusions of law or memorandum decision or opinion upon which the order or judgment is based.

(c) Failure to file a docketing statement within the time set forth above will be grounds for sanctions, including dismissal of the appeal, under Wis. Stat. Rule 809.83(2).

(d) A motion for extension of time within which to file the docketing statement will be granted only for the most compelling reasons. Counsel who filed the notice of appeal is responsible for insuring that the docketing statement is timely filed in this court

even if new counsel will actually handle the appeal. Only one docketing statement may be filed for each notice of appeal; if there is more than one appellant, appellants must consult and decide jointly who is responsible for filing the single docketing statement.

(e) Respondent, within 7 days of receipt of the docketing statement, may file an *original and one copy* of a single-page response if respondent strongly disagrees with appellant's statement of the case or the issues on appeal. The response must be sent to all other counsel. If respondent believes there is a jurisdictional defect, respondent should file a motion to dismiss. Multiple respondents should consult on the nature of the response to appellant's docketing statement and, if they decide to file a response, file only one response.

(f) Respondent must file a separate docketing statement if a cross-appeal is filed. The prior paragraph applies to appellants who are also cross-respondents. Cross-appellants and cross-respondents are subject to the same above provisions as are appellants and respondents.

(g) If a docketing statement indicates a jurisdictional defect, the Presiding Judge may direct the parties by order to address the question of jurisdiction in a specific form and time period.

C. Time Limits for Records and Briefs [§ 21.31]

Unless ordered otherwise by the court, the time for designating, ordering, preparing, serving and filing the transcripts, preparing and filing the record, and filing the briefs established by the Rules of Appellate Procedure, ch. 809, shall not be affected by the provisions of these procedures.

D. Presubmission Conference [§ 21.32]

(a) In any eligible case, the court may, at its option, require counsel to attend, either by telephone or in person, a presubmission conference with a senior staff attorney of the court designated as a conference attorney.

(b) All attorneys of record are required to participate in the conference unless they notify the conference attorney that they are waiving their briefing rights. Failure to attend the conference may result in the imposition of sanctions pursuant to Wis. Stat. Rule 809.83(2). The purposes of a conference are to determine: (a) whether the appeal can be adequately briefed in fewer than the maximum number of pages permitted by Wis. Stat. Rule 809.19; (b) whether the submission and decision of the appeal can be expedited by a reduced briefing schedule, by summary disposition, or by other expedited means permitted under the Rules of Appellate Procedure; (c) what the issues are on appeal and the standards of review for those issues; (d) whether it is possible to narrow the issues on appeal; (e) whether the transcripts and record can be reduced and whether a statement in lieu of a portion of the record or a transcript can be agreed upon under Wis. Stat. Rule 809.15(5); (f) whether oral argument and/or a published opinion is likely to result in the appeal; (g) whether joint briefing by multiple parties is practical; (h) whether opposing counsel, after having an opportunity to discuss the case, may be able to reach a settlement; and (i) whether the processing of the appeal can be simplified or expedited in any other way.

(c) The ultimate objectives of the conference will be to reduce the time between the filing of the notice of appeal and the decision of the Court of Appeals while, at the same time, permitting the Court of Appeals to address its increasing workload and to reduce the expense of appeals to the litigants while providing alternative methods for expediting appeals. An order will be entered by the Presiding Judge upon recommendation of the conference attorney after the conference incorporating any matters resolved or identified at the conference.

(d) Conferences must be attended by counsel with responsibility for the appeal and authority to make decisions about any aspect of the appeal covered by these procedures. If lead counsel cannot attend, that attorney must: (1) appoint a substitute attorney to attend the conference; (2) delegate to the attending attorney the broadest feasible authority to narrow the appeal or agree on case processing matters; and (3) be available at the time of the conference. The parties to an appeal may be required to attend a conference. When the business office of counsel is not in the vicinity of the conference site, or for any other reason, the court may, at its option, hold any conference by telephone conference call.

(e) The conference date will be set by telephone with written confirmation or in a written notice informing counsel that a conference will be held. Unless counsel already has a directly conflicting court date, a request to alter the date will be disfavored. If

a scheduled conference unavoidably conflicts with any counsel's schedule, he or she is obliged to contact all opposing counsel to determine alternative dates before contacting the conference attorney's secretary to reschedule.

(f) All matters discussed at the conference are completely confidential and will not be disclosed by the conference attorney except as embodied in the conference attorney's recommendation to the Presiding Judge for an order concerning further proceedings in the appeal or to the judge reviewing a request for reconsideration.

(g) The costs of preparing and filing a docketing statement are not taxable.

(h) In a case in which, after review of the docketing statement, the court finds a conference unnecessary or inappropriate, the court may on its own motion issue an order limiting the length of briefs, requiring joint briefing, setting the schedule for filing the record and briefs, or regulating any other aspect of the appeal that could be handled at a conference. Wis. Stat. Rules 809.20, 809.21(1) and 809.82(2).

(i) Any order issued by a Presiding Judge upon the recommendation of the conference attorney is subject to reconsideration upon filing of an appropriate motion within 5 days of the date of the order.

(j) If the case is expedited per agreement reached at the presubmission conference, the clerk's office will not send notice of receipt of briefs or notice of submission. The timing and length of briefs will be detailed in the order expediting the case.

Supplement Chapter 22
Introduction to Supreme Court Review

Book sections supplemented: 22.1 and 22.2

Book section replaced: 22.4

22.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Page 1: Amended first sentence in second paragraph in section

This chapter also discusses the general rules governing procedure in the supreme court and electronic filing (e-filing) in that court, along with the provision for reconsideration of a supreme court decision. The procedures for obtaining supreme court review are detailed in subsequent chapters.

22.2 Supreme Court Function

Page 3: Amended Garcia *citation in second-to-last paragraph in section*

For a variety of reasons, including recusal and illness, there is an increasing number of cases in which the supreme court has issued no opinion (thus affirming the court of appeals) because of an equally divided court. *See, e.g.*, *State v. Garcia*, 2021 WI 76, 399 Wis. 2d 324, 964 N.W.2d 342, *cert. denied*, 142 S. Ct. 1442 (2022). Current rules do *not* allow the appointment of temporary or reserve supreme court justices.

22.4 E-Filing: Phased Transition

Pages 5–7: Replaced section heading and section

22.4 E-filing

E-filing is now the norm in the supreme court using the same procedures as in the court of appeals. *See* ch. 5, §§ 18.2–18.7, *supra*; *see also* Wis. Sup. Ct. Orders 19-02C, 20-07C, 2023 WI 10, ___ Wis. 2d ___ (Feb. 21, 2023) (terminating interim e-filing rules effective July 1, 2023). E-filing is required in all supreme court cases in which the parties are represented by attorneys, except for certain "judicial/attorney proceedings," such as judicial disciplinary proceedings and bar-membership-related proceedings, which continue to be accomplished by traditional (paper) means, although the supreme court has issued an interim rule to transition even judicial or attorney proceedings to e-filing. Wis. Sup. Ct. Order. 23-03, 2023 WI 47, ___ Wis. 2d ___ (eff. July 1, 2023). As with documents filed in the court of appeals, e-filings in the supreme court must be submitted by 11:59 p.m. on the due date. *See* Book § 18.3. As in the court of appeals, e-filing constitutes service on all parties unless they are paper parties, in which situation traditional service is required. *See* Book § 18.3.

Chapter 22
Introduction to Supreme Court Review

I. Scope
[§ 22.1]

Under the two-tiered appellate system, the supreme court serves a distinctly different function than does the court of appeals. This chapter emphasizes the importance of the supreme court's law-development function in the administration of justice and outlines the types of review available in the supreme court. [1]

This chapter also discusses the general rules governing procedure in the supreme court, and the phase-in of electronic filing (e-filing) in that court, along with the provision for reconsideration of a supreme court decision. The procedures for obtaining supreme court review are detailed in subsequent chapters.

II. Supreme Court Function
[§ 22.2]

Pursuant to the 1978 court reorganization, error correction became the primary duty of the court of appeals, while the supreme court became primarily involved in overseeing the development of the law. *State v. Mosley*, 102 Wis. 2d 636, 665–66, 307 N.W.2d 200 (1981); *see also supra* §§ 1.2–.3 (allocation of appellate duties and functions). In most instances, the court of appeals is the final arbiter, the court of last resort. Review in the supreme court should occur only when the issues are significant to the justice system as a whole or to a significant class of litigants. A case with issues of importance only to the parties to the dispute should not reach the supreme court.

Supreme court review is entirely discretionary. Consistent with this discretion, the court is free to choose cases for review that it thinks fulfill the institutional criteria for further review under the two-tiered appellate system. Although the supreme court does occasionally take cases when the obvious objective is to correct error, doing so is unusual. Routine acceptance of error-correction reviews would be contrary to the primary purpose of the reorganized court system, which was to eliminate the supreme court's backlog, allowing it to take a more scholarly, superintending role in the justice system while maintaining, indeed increasing, the availability of appellate review by creating a court of appeals to correct circuit court errors.

There are two main methods of obtaining supreme court review. The first is petitioning for review of a court of appeals decision. *See* Wis. Stat. § 808.10. The second method is bypassing the court of appeals, either on a party's petition to bypass or on certification by the court of appeals. *See* Wis. Stat. § 808.05.

Before the supreme court will grant review, it must be convinced that a case presents issues of importance to the general administration of justice. A former Chief Justice of the Wisconsin Supreme Court commented that an attorney may spend time—and the client's money—well when the propriety of fact-finding, sufficiency of evidence, and erroneous exercise of discretion are argued before the court of appeals, but such arguments have little place before the supreme court. The supreme court's primary concern is clarifying or interpreting the law, not reviewing facts or discretionary acts of the circuit court. Nathan S. Heffernan, *Appellate Practice in Wisconsin, in Appellate Advocacy in the Wisconsin Courts: Different Approaches for the Different Courts* 9 (1984).

The discriminating nature of the supreme court's review is clearly revealed in statistics showing that the supreme court granted only about nine percent of the petitions for review that it disposed of in the 2019–20 term. *Wisconsin Supreme Court Annual Statistical Report: 2020–2021 Term*, https://www.wicourts.gov/sc/DisplayDocument.pdf?content=pdf&seqNo=439770. This figure is illuminating, given that petitions for review constitute the great majority of cases in which the supreme court reviews a court of appeals decision on the merits. The supreme court's discrimination in selecting its caseload has allowed the court to limit its backlog and ensure that decisions will be released within a reasonable time. It has also allowed the court to give a more in-depth consideration to the cases it does review on the merits.

This has also led to longer opinions and more concurrences and dissents. *See, e.g.*, *Tikalsky v. Friedman*, 2019 WI 56, 386 Wis. 2d 757, 928 N.W.2d 502 (one concurrence and two dissenting opinions); *Carney-Hayes v. Northwest Wis. Home Care, Inc.*, 2005 WI 118, 284 Wis. 2d 56, 699 N.W.2d 524 (one concurrence and two partial concurring and dissenting opinions). Although some might criticize this development, it is not surprising, given that the court is going beyond applying law to facts by interpreting the law in light of policy factors such as socioeconomic considerations, the changing winds of politics, and the efficient administration of justice. These are matters on which there can be legitimate differences of opinion, and it is only reasonable to expect lengthier and more divided opinions. Portions of an opinion not supported by a majority are not precedent, however, and only majority opinions have precedential value. *State ex rel. Ziervogel v. Board of Adjustment*, 2003 WI App 82, ¶ 13, 263 Wis. 2d 321, 661 N.W.2d 884, *rev'd on other grounds*, 2004 WI 23, 269 Wis. 2d 549, 676 N.W.2d 401.

For a variety of reasons, including recusal and illness, there is an increasing number of cases in which the supreme court has issued no opinion (thus affirming the court of appeals) because of an equally divided court. *See, e.g.*, *State v. Garcia*, 2021 WI 76, 399 Wis. 2d 324, 964 N.W.2d 342. Current rules do *not* allow the appointment of temporary or reserve supreme court justices.

For attorneys, the practical significance of the supreme court's function is that to obtain review in the supreme court, the case must be characterized in a way that makes it attractive to the court. Issues of first impression, statutory ambiguities, constitutional challenges, and similar issues should be emphasized. If a case does not present this type of issue, can the individual problem nonetheless be translated into a larger policy concern? Attorneys should examine the Wis. Stat. § 809.62(1r) criteria for petitions for supreme court review and try to frame their cases within one or more of these criteria. *See infra* § 23.9. Attorneys who can only recite a litany of errors should assume that seeking supreme court review will be, in all probability, a fruitless endeavor.

III. General Supreme Court Procedure [§ 22.3]

The computation of time periods, the penalties for rule violations, the applicability of the rules of civil procedure, and the duties of counsel are the same for the supreme court as for the court of appeals. *See* Wis. Stat. §§ 809.82–809.86; *see also supra* ch. 18.

The procedures for obtaining supreme court review by petition for review, bypass, original action, and supervisory writ are covered by individual appellate rules applicable to the supreme court. These are discussed in chapters 23, 24, 25, and 26, *infra*.

Once the supreme court has taken jurisdiction of a matter, the rules governing procedures in the court of appeals apply to the continued proceedings in the supreme court unless the supreme court specifically orders otherwise. Wis. Stat. § 809.63. Some court of appeals procedures, such as those for commencing an appeal and those that are clearly preempted by other supreme court procedures (e.g., reconsideration), do not apply to continued supreme court proceedings. Whether a procedure applies can generally be determined by a common sense analysis of whether the court of appeals procedure fits in the supreme court context.

Additional procedures to be followed once the supreme court grants a petition for review are outlined in the order granting the petition. *See infra* § 23.14.

If the supreme court is equally divided on the merits of a case, the route by which the case reached the supreme court affects the disposition. Ordinarily, the decision of the court of appeals is affirmed if there is a tie vote in the supreme court. *See State v. Elam*, 195 Wis. 2d 683, 538 N.W.2d 249 (1995). This is the result if the parties have the benefit of a full appellate opinion and then petition for supreme court review. *See State v. Young*, 191 Wis. 2d 393, 528 N.W.2d 417 (1995). If, however, the matter comes to the supreme court on certification or bypass—without the benefit of a court of appeals decision—the supreme court will remand the case to the court of appeals for a decision. *State v. Richard Knutson, Inc.*, 191 Wis. 2d 395, 396, 528 N.W.2d 430 (1995).

In one case, however, the court concluded that a 3–3 tie required neither a remand nor an affirmance of the court of appeals' decision. *Ives v. Coopertools*, 208 Wis. 2d 55, 559 N.W.2d 571 (1997). Although the supreme court was evenly divided on the legal basis for its decision, it unanimously agreed that the decision of the court of appeals was wrong and should be reversed with an order affirming the circuit court. *Id.* at 57–59. In another case, what appeared to be a unanimous 5–0 supreme court decision affirming and remanding a court of appeals decision was determined, on reconsideration, to be a deadlock, thus requiring simple affirmance. *State v. Johnson*, 2014 WI 16, ¶ 1, 353 Wis. 2d 119, 846 N.W.2d 1. Over a sharp dissent, three justices on reconsideration concluded that there had been no majority on any of the three options available on remand, thus deadlocking the issue of modification, leaving affirmance as the only option. *Id.* ¶¶ 5, 6.

Generally, a supreme court decision overruling or repudiating a decision applies retrospectively. *Prosser v. Leuck*, 225 Wis. 2d 126, 140, 592 N.W.2d 178 (1999) ("The court has recognized exceptions … when it would be inequitable in the particular case to apply the new rule retrospectively.").

IV. E-filing: Phased Transition
[§ 22.4]

It was formerly true that all documents filed in the supreme court were governed by the same rules applicable in the court of appeals for filing and service. But although e-filing became mandatory for all but self-represented persons in the court of appeals on July 1, 2021, the supreme court decided to phase in the implementation of e-filing in that court. Accordingly, persons seeking supreme court review must be alert to the different rules.

The supreme court has determined that it will continue to experiment with e-filing "for the purpose of further refining and testing the electronic filing system." Wis. Sup. Ct. Orders 19-02A, 20-07A, 2021 WI 62, ___ Wis. 2d ___ (In re Interim Court Rule Governing Electronic Filing in the Supreme Court) (eff. July 1, 2021), https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=378648 [hereinafter "revised interim rule"]. During this period, limited proceedings will be included in an e-filing pilot project, while documents in most other proceedings will continue to be filed and served by traditional methods. *Id.* Thus, attorneys practicing in the supreme court will need to be aware of the basic rules for both e-filing and traditional paper filing. *See supra* §§ 18.3–18.4.

The revised interim rule sets forth the particulars of the supreme court filing and service rules during the phased transition to e-filing. In essence, except for participants chosen by the court to participate in the e-filing pilot project, all parties in supreme court proceedings will use traditional methods of filing and service. Moreover, the former rules for filing and service, including multiple copies, colored covers, etc., still apply. A copy of the former rules of Wis. Stat. ch. 809 (2019–20), may be found at https://docs.legis.wisconsin.gov/2019/statutes/statutes/809.pdf. During the transition, however, even non-pilot participants (except self-represented parties) must e-file certain documents and follow certain provisions of the new rules, as set forth in Wis. Sup. Ct. Order 20-07, 2021 WI 37, ___ Wis. 2d ___ (eff. July 1, 2021), https://www.wicourts.gov/sc/rulehear/DisplayDocument.pdf?content=pdf&seqNo=360509.

Appendix A to the revised interim rule sets forth the applicability of the *former* (i.e., pre-July 1, 2021) rules for non-pilot participants as follows:

1) Parties in non-pilot proceedings shall continue to file paper documents with the Clerk and to serve paper copies by traditional methods on other parties. *See* [Wis. Stat. §] 809.80(1), (2), (3), and (4) [(2019–20)].

2) Unless the Supreme Court orders otherwise in a particular matter, papers must be filed (i.e., physically received) in the Clerk's office by the close of business at 5:00 pm. Filings by facsimile ("fax") must complete transmission by 5:00 pm. *See* [Wis. Stat. §] 809.80(3), (4) [(2019–20)].

3) Handwritten signatures must be used to sign paper documents. *See* [Wis. Stat. §] 802.05(1) [(2019–20)].

4) Briefs, appendices, petitions for review, and responses to petitions for review shall continue to be printed and bound, with color covers if applicable. *See* [Wis. Stat. §§] 809.19(6)(b) and (c), 809.19(8)(b)4., 809.19(9), 809.62(4)(a) [(2019–20)].

5) The number of copies to be filed and served shall be as provided by former rule. *See* [Wis. Stat. §§] 809.19(8)(a), 809.62(4), 809.81(2) [(2019–20)].

6) An attorney filing a brief, appendix, petition for review, or response to a petition for review must file an electronic copy of the document with the court in addition to the paper copies. An attorney filing an appendix may file an electronic copy in addition to the paper copies. The attorney must certify that the electronic copy is identical to the paper copy. *See* [Wis. Stat. §§] 809.19(12)(f) and (13)(f) and Comment, 809.32(1)(fm), 809.62(4) [(2019–20)].

7) Certifications of length, confidentiality, and client counseling shall continue to use the wording provided in [the] former rule. *See* [Wis. Stat. §§] 809.19(2)(b), (8)(d), 809.32(1)(c) [(2019–20)].

(Footnote omitted.)

Appendix A to the revised interim rule, *supra*, sets forth the applicability of the *new* (i.e., post-July 1, 2021) rules for non-pilot participants as follows:

1) The formatting of documents, including form, pagination, and length, shall be as provided in the new rules. *See* [Wis. Stat. §§] 809.19(8)(b), (bm), and (c)[,] 809.81

2) The appendix shall be formatted in accordance with the new rules. *See* [Wis. Stat. §] 809.19(2).

3) The confidentiality provisions of the new rules apply with respect to protection of sealed and redacted information in the record and identification of a petition seeking a protective order. *See* [Wis. Stat. §§] 809.801(14), 809.81(9).

4) The Clerk will use the circuit court document number in numbering the record on appeal. *See* [Wis. Stat. §§] 809.15(2), 809.19(2).

5) The Clerk will calculate the time for responsive pleading using the provisions of the new rules. *See* [Wis. Stat. §] 809.19(3), (4), and (6). The date the paper copy of a document is physically received in the clerk's office will be used as the date of filing for the purpose of this calculation consistent with section 6.A(2) [of appendix A of the revised interim rule, quoted in the preceding numbered list as paragraph 2)].

6) The electronic copy of briefs and appendices submitted under [Wis. Stat. §] 809.19 (12) and (13) [(2019–20)] must meet the court's technical standards for electronic documents. *See* [Wis. Stat. §] 809.801(8).

V. Reconsideration [§ 22.5]

A party may seek reconsideration of a supreme court judgment or opinion by filing a motion for reconsideration within 20 days after the date of the decision. Wis. Stat. § 809.64.

The motion for reconsideration must conform to the general motion requirements of Wis. Stat. § 809.14. *See supra* ch. 13. The motion is not intended to be an opportunity to reargue issues already argued and considered. Rather, the primary purpose is to alert the court to errors or omissions in its decision.

To be reconsidered, the supreme court's judgment or opinion must be final. A motion cannot be brought to reconsider an order denying a petition for review; such an order is not considered final for these purposes. *Archdiocese of Milwaukee v. City of Milwaukee*, 91 Wis. 2d 625, 626–27, 284 N.W.2d 29 (1979).

This rule was distinguished in one case, *Gunderson v. State*, 106 Wis. 2d 611, 612 n.1, 318 N.W.2d 779 (1982), in which the supreme court dismissed a petition for review as not timely filed. The court stated that dismissal of a petition, rather than a

discretionary denial of the petition for review, constituted an opinion that the court was without jurisdiction and thus was subject to reconsideration. With this one exception, it appears there is no statutory right to file a motion for reconsideration unless the challenged decision goes to the merits of a case on review.

The supreme court will not reconsider its previous denial of a motion for reconsideration. *See City of Edgerton v. General Cas. Co.*, 190 Wis. 2d 510, 513, 527 N.W.2d 305 (1995).

Supplement Chapter 23
Petition for Supreme Court Review—Wis. Stat. § 809.62

Book sections supplemented: 23.1, 23.3, 23.5, 23.12, and 23.13

23.1 Scope

Pages 1–2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

23.3 Filing and Service

Page 4: Added paragraph after first paragraph in section

Parties represented by counsel must file and serve all supreme court appellate documents, including petitions for review and responses, under the same e-filing rules applicable to proceedings in the court of appeals. *See* Wis. Sup. Ct. Orders 19-02C and 20-07C, 2023 WI 10, ___ Wis. 2d ___ (Feb. 21, 2023) (terminating interim e-filing rules effective July 1, 2023); *see also* Supp. § 18.3. Paper (traditional) filing and service are still required in certain judicial or attorney proceedings, Wis. Sup. Ct. Order. 23-03, 2023 WI 47, ___ Wis. 2d ___ (eff. July 1, 2023), and for self-represented parties who do not elect to file electronically. *See* Wis. Stat. §§ 809.80, 809.01(25).

Page 4: Deleted Caution

Page 6: Amended citation after first sentence in fourth-to-last paragraph in section

As with any document filed in the court, the petition for review must be served on all other parties. Wis. Stat. §§ 809.80(2), 809.801; *see also supra* §§ 18.5–.7. Filing constitutes certification of service. Therefore, service should precede or be simultaneous with filing. A failure to timely serve is not jurisdictional, but a party not served may move to dismiss or for another penalty. Wis. Stat. § 809.83(2); *see also State v. Rhone*, 94 Wis. 2d 682, 688, 288 N.W.2d 862 (1980). The basis for such a motion is not lack of personal jurisdiction but lack of notice as required by the rules. Robert J. Martineau & Richard R. Malmgren, *Wisconsin Appellate Practice* § 6.1, at 38 (1978).

23.5 [Form and Contents] In General

Page 7: Deleted Note

Page 8: Deleted last paragraph in section

23.12 [Form and Contents] Appendix

Pages 14–15: Deleted last paragraph in section

23.13 Response and Cross-review

Page 16: Replaced first paragraph after Practice Tip

As with the petition, the response must comply with the formatting requirements in the rules as adopted on July 1, 2021, including the pagination and length requirements under Wis. Stat. § 809.19(8)(b), (bm), and (c). The length of the response, exclusive of appendices, cannot exceed 35 pages, if a monospaced font or handwriting is used, or 8,000 words, if a proportional serif font is used. Wis. Stat. § 809.62(4). The response must have a white cover. As with the petition, the response to the petition must be filed electronically if it is filed by an attorney. Wis. Stat. § 809.801; *see* Supp. § 22.4. E-filing is optional for self-represented parties. Wis. Stat. § 809.801(3); Book § 18.3 (e-filing). The time for filing a response to the petition for review may be affected by the timely filing of a motion for reconsideration in the court of appeals. *See* Wis. Stat. § 809.62(1m)(c)–(e).

Chapter 23
Petition for Supreme Court Review—Wis. Stat. § 809.62

I. Scope
[§ 23.1]

This chapter considers the primary method by which review is obtained in the supreme court: petitioning for review of an adverse court of appeals decision pursuant to Wis. Stat. §§ 808.10 and 809.62. [1]

Caution. This chapter should be read in conjunction with section 22.4 *supra*, which discusses the filing and service rules in the supreme court, including electronic filing (e-filing). *See* Wis. Sup. Ct. Orders 19-02A, 20-07A, 2021 WI 62, ___ Wis. 2d ___ (In re Interim Court Rule Governing Electronic Filing in the Supreme Court) (eff. July 1, 2021).

Appeals on petitions for review constitute the great majority of cases reaching the supreme court for decision on the merits, far outnumbering successful bypasses (on either petition or certification). In fact, the court granted no bypasses or certifications in the 2019–20 term. *Wisconsin Supreme Court Annual Statistical Report: 2020–21 Term*, https://www.wicourts.gov/sc/DisplayDocument.pdf?content=pdf&seqNo=439770. Nonetheless, only about eight or nine percent of petitions for review were granted during the 2019–20 and 2020–21 terms. *Id*. This illustrates how strictly the supreme court applies the criteria it uses to select petitions for review. *See supra* § 22.2.

This chapter discusses those criteria, the types of decisions that are reviewable, and who may seek review. The content, form, and filing of a petition for review are also discussed.

II. Matters That May Be Reviewed [§ 23.2]

Wis. Stat. §§ 808.10 and 809.62(1m) provide that a party may seek review of an adverse court of appeals decision by filing a petition for review in the supreme court. Any party, including the state, may petition for review of an adverse decision. *See State v. Barrett*, 89 Wis. 2d 367, 371, 280 N.W.2d 114 (1979).

The first requirement under Wis. Stat. §§ 808.10 and 809.62(1m) is that the review be of a decision. There can be only one "decision" in a court of appeals case, and that is the decision that finally disposes of the case in the court of appeals. *Henderson v. Rock Cnty. Dep't of Soc. Servs. (In the Interest of A.R.)*, 85 Wis. 2d 444, 446, 270 N.W.2d 581 (1978). The decision must be supported by a written opinion summarizing the reasons for the decision. *Id*. An order granting a motion for relief pending appeal is not reviewable by petition to review because it does not terminate the court of appeals' review. *Id*. On the other hand, a court of

appeals order dismissing an appeal on jurisdictional grounds is a final decision and may be challenged by a petition for review. *State v. Jenich*, 94 Wis. 2d 74, 77, 288 N.W.2d 114 (1980). Of course, an opinion that contains a mandate disposing of the appeal is a final decision. *Henderson*, 85 Wis. 2d at 446.

An *adverse decision* is defined as a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought by the party seeking review. Wis. Stat. § 809.62(1g)(a). This includes a failure by the court of appeals to grant the full relief sought or a denial of the preferred relief sought. Wis. Stat. § 809.62(1g)(b). An adverse decision does not include, however, a disagreement with the court of appeals' language or rationale in reaching its result. Wis. Stat. § 809.62(1g)(c). The definition in Wis. Stat. § 809.62(1g) is a codification of *Neely v. State*, 89 Wis. 2d 755, 758, 279 N.W.2d 255 (1979), which defined a *decision* as the mandate, result, or disposition of the case, as opposed to the *opinion*, which explains the mandate, result, or disposition.

Once the supreme court has granted a petition for review, however, the adverse-decision rule does not bar a respondent from asking the supreme court to review the court of appeals' reasoning without also asking for a change in the disposition or result reached by the court of appeals. *State v. Wyss*, 124 Wis. 2d 681, 689–90, 370 N.W.2d 745 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 506 & n.6, 451 N.W.2d 752 (1990).

The supreme court will not review court of appeals orders granting or denying permission to appeal from nonfinal orders. *See Aparacor, Inc. v. DILHR*, 97 Wis. 2d 399, 403–04, 293 N.W.2d 545 (1980). If the supreme court reviews a court of appeals decision on the merits of an appeal from a nonfinal judgment or order, the supreme court will not review the court of appeals' discretionary decision to accept the appeal but will confine its review to the court of appeals' decision on the merits. *Id*. The refusal to review a court of appeals decision to grant or deny a petition for leave to appeal is a matter of practice and policy, not a matter of jurisdiction. *See Leavitt v. Beverly Enters., Inc.*, 2010 WI 71, ¶¶ 45–47, 326 Wis. 2d 421, 784 N.W.2d 683.

It has long been recognized that an appellate court need not consider all issues on appeal if the disposition of one issue resolves the entire matter. *See Hanley Implement Co. v. Riesterer Equip., Inc.*, 150 Wis. 2d 161, 170, 441 N.W.2d 304 (Ct. App. 1989). If the supreme court reversed the court of appeals in such a situation, the usual practice was to remand to the court of appeals for disposition of the issues not resolved, rather than address those issues. Another supreme court decision, however, indicates that the supreme court now will review those issues, but only if they are specifically presented to the supreme court. *State v. Johnson*, 153 Wis. 2d 121, 449 N.W.2d 845 (1990); *see also infra* § 23.13.

Once a case is before the supreme court, that court has discretion to review any compelling and substantial issue that the case may present. *Univest Corp. v. General Split Corp.*, 148 Wis. 2d 29, 32, 435 N.W.2d 234 (1989). This is true even if the issues were raised in a previous proceeding in which no petition for review was filed. *Id*. It is also true if the case is before the supreme court on certification. *State v. Mitchell*, 167 Wis. 2d 672, 677–78, 482 N.W.2d 364 (1992). The supreme court is not limited to the issues as certified by the court of appeals or to the issues that it accepts for review in its order granting certification. *Id*.

III. Filing and Service
[§ 23.3]

A petition for review must be filed with the clerk of the supreme court within 30 days after the date of the decision of the court of appeals. Wis. Stat. §§ 808.10(1), 809.62(1m). The major exception to this rule is that the 30-day filing period is tolled by the timely filing of a motion for reconsideration in the court of appeals. *See* Wis. Stat. §§ 808.10(2), 809.32(5), 809.62(1m)(b). A petition for review is filed when it is received in the clerk's office. *See First Wis. Nat'l Bank v. Nicholaou*, 87 Wis. 2d 360, 365, 274 N.W.2d 704 (1979). If the clerk does not receive the petition within 30 days, the court loses subject-matter jurisdiction. *Id*. The 30-day limit is strictly enforced. *Id*. That period may be tolled, however, in cases of filings by self-represented prisoners. *See State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶ 32, 247 Wis. 2d 1013, 635 N.W.2d 292.

Caution. Unless selected to participate in the e-filing pilot project in the Wisconsin Supreme Court, parties represented by counsel must file and serve paper copies of all supreme court documents and also must file an electronic copy of briefs, appendices, petitions for review, and responses to petitions for review. Wis. Sup. Ct. Orders 19-02A, 20-07A, 2021 WI 62, ___ Wis. 2d ___ (In re Interim Court Rule Governing Electronic Filing in the Supreme Court) (eff. July 1, 2021); *see supra* §22.4.

Note. E-filing documents will eliminate the mailing issues discussed in the following paragraph.

In *Nicholaou*, 87 Wis. 2d at 366, the court rejected arguments that a petitioner could extend the 30-day limit in any way and dismissed the petition as untimely. The court noted that the petitioner did not receive the 3-day extension for mailing pursuant to Wis. Stat. § 801.15(5), because the 30-day period was commenced by the filing, not service, of the court of appeals decision. *Id*. at 365. The court rejected a claim that filing of the petition was complete upon mailing and suggested that an extension was not possible under Wis. Stat. § 809.82(2), because the 30-day limit was set by statute, while the authority to grant extensions is based on court rule. *Id*.

The strictness with which the 30-day filing period is enforced was further underscored in *Gunderson v. State*, 106 Wis. 2d 611, 318 N.W.2d 779 (1982). There, the court reiterated that a petition for review is not filed until the clerk of the supreme court actually receives it. *Id*. at 614. The court emphasized that the petitioner is solely responsible for the vagaries of mail delivery and must assume the risk of late delivery if that method of transmittal is chosen. *Id*. at 615.

A very limited exception to the absolute nature of the 30-day time period was recognized in a criminal case in which the inadvertent error of the court of appeals in mailing its decision to former counsel rather than current counsel caused the petitioner to receive the decision after the 30 days had expired. *See State ex rel. Fuentes v. Wisconsin Ct. of Appeals*, 225 Wis. 2d 446, 593 N.W.2d 48 (1999). The supreme court concluded that habeas corpus relief was warranted and allowed the innocent party 30 days from the date of its decision to file a petition for review.

The 11th-hour filing practices of all too many attorneys gave the supreme court cause to further explain, in *St. John's Home v. Continental Casualty Co*., 150 Wis. 2d 37, 441 N.W.2d 219 (1989), the strict filing rules for petitions for review. A petition for review was delivered to the clerk's office on the 30th day, but after the normal 5:00 p.m. closing time. The supreme court, recognizing that other such filings had been accepted in the past, determined that this filing was timely but provided that, in the future, all papers must be filed during regular office hours; petitions received after hours would be deemed filed as of the next day. *Id*. at 44. Official office hours are 7:15 a.m. to 5:00 p.m. *Id*. at 45. A petition due on a weekend or legal holiday is not due until the following workday. *See* Wis. Stat. § 801.15(1)(b); *see also supra* § 18.9. The *St. John's Home* opinion lists the legal holidays when the clerk's office is closed. *St. John's Home*, 150 Wis. 2d at 45.

Note. Since a 1996 federal district court decision invalidated Good Friday afternoon as a state holiday, the clerk's office does *not* close on Good Friday. *See Freedom from Religion Found. v. Thompson*, 920 F. Supp. 969 (W.D. Wis. 1996). The filing rules set forth in *St. John's Home* presumably also apply to filings in the court of appeals inasmuch as the two courts share the same clerk's office.

Individuals filing paper documents should be aware that mail addressed to the clerk of the supreme court must contain the correct post office box number or it will be sent to a central state mailroom, where its actual receipt or filing by the clerk may be delayed by several days. The clerk's address for the purpose of mailings is Clerk of the Court, Supreme Court, P.O. Box 1688, Madison, WI 53701-1688. In-person filings and deliveries must be made to the clerk's office at 110 East Main Street (Tenney Building), Suite 215, Madison. The clerk's main telephone number is (608) 266-1880.

A $195 filing fee must accompany the petition for review. Wis. Stat. § 809.25(2)(a)1.

As with any document filed in the court, the petition for review must be served on all other parties. Wis. Stat. § 809.80(2); *see also supra* §§ 18.5–.7. Filing constitutes certification of service. Therefore, service should precede or be simultaneous with filing. A failure to timely serve is not jurisdictional, but a party not served may move to dismiss or for another penalty. Wis. Stat. § 809.83(2); *see also State v. Rhone*, 94 Wis. 2d 682, 688, 288 N.W.2d 862 (1980). The basis for such a motion is not lack of personal jurisdiction but lack of notice as required by the rules. Robert J. Martineau & Richard R. Malmgren, *Wisconsin Appellate Practice* § 6.1, at 38 (1978).

The court will likely deny a motion to dismiss for untimely service if service was made as soon as the defect was discovered and no prejudice is shown. The court may, however, still impose some monetary penalty. *See* Wis. Stat. § 809.83(2); *see also supra* § 18.11.

The filing of the petition for supreme court review stays further proceedings in the court of appeals. The stay prevents remittitur and effectively stays the court of appeals' mandate. There is one exception to the stay—namely, that the court of appeals may grant reconsideration pursuant to Wis. Stat. § 809.24. *See* Wis. Stat. § 809.62(5); *see also supra* § 16.2. This exception allows the court of appeals to correct an error or omission that may have prompted the petition for review.

If a petition for review is filed before the timely filing of a motion for reconsideration in the court of appeals, the rules address the impact of that filing on the supreme court review process, including steps a party must take if the court of appeals issues an amended decision. *See* Wis. Stat. § 809.62(1m)(c)–(e).

IV. Form and Contents [§ 23.4]

A. In General [§ 23.5]

Note. As the Wisconsin Supreme Court continues its phased-in implementation of the e-filing rules, it is requiring all parties (even in cases not included in the e-filing pilot project) to follow the post-July 1, 2021 rules governing the formatting of documents (including pagination and length under Wis. Stat. §§ 809.19(8)(b), (bm), (c)). Wis. Sup. Ct. Orders 19-02A, 20-07A, 2021 WI 62, ___ Wis. 2d ___ (In re Interim Court Rule Governing Electronic Filing in the Supreme Court) (eff. July 1, 2021). In non-pilot-project proceedings, the number of copies to be filed and served is provided under the prior rules. *Id.*; *see also supra* § 22.4.

The purpose of the petition for review is to convince the supreme court that a case is worthy of further review. The primary function of the petition is to address the criteria for review set forth in Wis. Stat. § 809.62(1r). The brief-like format used for petitions is designed to ensure that the material is easily conveyed to the court.

Neither the petition nor the response may exceed 35 pages, if handwriting or a monospaced font is used, or 8,000 words, if a proportional serif font is used. Wis. Stat. § 809.62(4).

The petition must conform to the formatting specifications for briefs set forth in Wis. Stat. §§ 809.19(8)(b), (bm), and 809.62(4). *See also supra* § 11.2. In addition, in termination-of-parental-rights cases, for a petitioner other than the state, the petition must be signed by both the petitioner and counsel, if any, and counsel cannot sign in lieu of the petitioner. Wis. Stat. § 809.107(6)(f).

Comment. This is, apparently, the only instance in which a non-self-represented petitioner must personally sign a petition for review.

As in the case of appellate briefs, *see supra* § 11.17, petitions for review and responses to petitions for review must take steps to ensure confidentiality. In addition, except upon a showing of good cause, crime victims must be identified by one or more initials or other appropriate pseudonym or designation. *See* Wis. Stat. § 809.86.

Ten copies of the petition must be filed in proceedings not included in the supreme court's e-filing pilot project. *See* Wis. Stat. § 809.62(4)(a) (2019–20). In addition to the 10 paper copies in such cases, an electronic copy of the petition must be filed if it is filed by an attorney under Wis. Stat. § 809.62(4)(b) (2019–20). *See supra* § 22.4. E-filing is optional for self-represented parties. Wis. Stat. § 809.62(4)(b) (2019–20); *see also* Wis. Stat. § 809.801(3). The procedures for e-filing in the appellate courts are set forth at section 18.3, *supra*.

B. Cover [§ 23.6]

The cover of a petition or response must be white and contain the title of the document and the case number and caption. Wis. Stat. § 809.62(4).

C. Table of Contents [§ 23.7]

The petition must contain a table of contents, *see* Wis. Stat. § 809.62(2)(b), which should appear on the first page of the petition. Although the rules do not prescribe the form of the table of contents, it should follow the form for briefs under Wis. Stat. § 809.19(1)(a) and contain descriptive headings for each section of the argument.

Although there is no requirement for including a table of cases, statutes, or other authorities, a table should be included. *See supra* § 11.10.

D. Statement of Issues [§ 23.8]

The petition must contain a statement of the issues the petitioner seeks to have reviewed, how they were raised before the court of appeals, and how that court decided them. Wis. Stat. § 809.62(2)(a). The issues generally can be framed as one-sentence questions and should be numbered. Stating how the issues were raised (e.g., in a brief on an appeal or in a petition for supervisory writ) lets the supreme court know immediately whether the issues were preserved for supreme court review. The court of appeals' decision usually may be expressed in a one- or two-sentence statement.

In addition, the statement of issues must identify issues sought to be reviewed that were not decided by the court of appeals. *Id*. "Subsidiary issues" are deemed to be included in the statement of the main issue. *Id*.

If the supreme court grants the petition for review, the petitioner can raise only those issues that have been identified in the petition, unless the supreme court orders otherwise. Wis. Stat. § 809.62(6). Therefore, the petition should clearly and specifically identify all issues pertaining to the case. Failure to raise an issue in the petition for review is deemed a waiver of any claim that the supreme court should consider that issue. *Preisler v. General Cas. Ins. Co.*, 2014 WI 135, ¶ 56, 360 Wis. 2d 129, 857 N.W.2d 136. The court retains jurisdiction, however, to review waived issues as it deems necessary. *Id.* ¶ 57. A party may move for leave to brief an issue not raised in the petition, but, in one case, the supreme court allowed a party to brief a new issue, ignoring the failure to raise the issue in the petition as well as the failure to seek leave to brief that issue, *State v. Denny*, 2017 WI 17, ¶ 63 n.15, 373 Wis. 2d 390, 891 N.W.2d 144, and denying a motion to strike, *State v. Denny*, No. 2015AP202-CR (Wis. Aug. 12, 2016) (order). Nonetheless, it would be prudent for a party wishing to brief a new issue to file a motion rather than briefing the issue without advance permission.

E. Statement of Criteria for Review [§ 23.9]

The criteria for review are set forth in Wis. Stat. § 809.62(1r). The petition must include a concise statement identifying those criteria that are present in the case. Wis. Stat. § 809.62(2)(c). In the absence of any such applicable criteria, the petition must include a concise statement of any other substantial or compelling reasons for review. *Id*.

The supreme court considers the criteria of Wis. Stat. § 809.62(1r) in determining whether to grant review of a court of appeals decision. However, the criteria, while providing the primary context for the supreme court's determination on a petition for review, do not dictate that determination. The court's decision whether to grant review remains discretionary.

The criteria in Wis. Stat. § 809.62(1r) coincide with the supreme court's institutional interest in overseeing the orderly and uniform development of the law. They identify recurring types of issues and interests that are generally cause for invoking the supreme court's discretionary appellate jurisdiction. The five criteria in Wis. Stat. § 809.62(1r) are as follows:

1. A real and significant question of federal or state constitutional law is presented.

2. The petition for review demonstrates a need for the supreme court to consider establishing, implementing, or changing a policy within its authority.

3. A decision by the supreme court will help develop, clarify, or harmonize the law, and

   a. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation;

   b. The question presented is a novel one, the resolution of which will have statewide impact; or

c. The question presented is not factual in nature but is a question of law of the type that is likely to recur unless resolved by the supreme court.

4. The court of appeals' decision is in conflict with controlling opinions of the U.S. Supreme Court or the supreme court or with other court of appeals' decisions.

5. The court of appeals' decision is in accord with the opinions of the supreme court or the court of appeals, but because of the passage of time or changing circumstances, such opinions are ripe for reexamination.

Attorneys considering review in the supreme court should analyze their cases in light of these criteria. Not only can such an analysis help disclose whether the case is one that has potential for further review, but it will also help the attorney decide how to characterize the issues in the petition in a manner designed to bring them within the focus of the supreme court's interest. Some cases will sell themselves; others must be more carefully packaged.

The petition for review must state which criteria from Wis. Stat. § 809.62(1r) support further review (i.e., how a supreme court resolution of the issues would satisfy specific criteria). Wis. Stat. § 809.62(2)(c). The criteria should be identified according to how they are numbered in the statute. The statement must be concise—a page or two, at most—so it will necessarily be conclusory. Its primary purpose is to identify the arguable bases for invoking the institutional responsibilities of the supreme court. A more complete exposition of the case is left for the argument section of the petition.

Wis. Stat. § 809.62(2)(c) provides that, if none of the statutory criteria are present, the petition must contain a concise statement of other substantial or compelling reasons for review. As a practical matter, however, at least one of the criteria should arguably apply in virtually any case. Even a case that presents nothing more than a claim of court of appeals error would appear to fit under Wis. Stat. § 809.62(1r)(d): "The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions."

Because Wis. Stat. § 809.62(1r)(d) is concerned with error correction (which is primarily the function of the court of appeals), that provision is not often a successful basis for supreme court review. The criteria under Wis. Stat. § 809.62(1r)(c), which address review when a decision of the supreme court "will help develop, clarify or harmonize the law," are more directly related to the supreme court's primary function of overseeing the development of legal doctrines.

On the other hand, if the basis for a petition for supreme court review is a shocking error or a disposition that has resulted in manifest injustice and none of the criteria relating to the supreme court's law-development function apply, it may be appropriate to plainly state that error correction is being sought. Although the criteria in Wis. Stat. § 809.62(1r) say nothing about justice in individual cases, no court should turn its back on an injustice. *See* Nathan S. Heffernan, *Appellate Practice in Wisconsin*, *in Appellate Advocacy in the Wisconsin Courts: Different Approaches for the Different Courts* 6–7 (1984).

The law-development function of the supreme court was reiterated in a decision that dismissed a petition for review as improvidently granted, *State v. Minued*, 141 Wis. 2d 325, 415 N.W.2d 515 (1987). The supreme court held that review of a circuit court's failure to give an instruction would constitute an error-correction review, not a law-development review as enumerated by the criteria in former Wis. Stat. § 809.62(1) (now found in Wis. Stat. § 809.62(1r)). *Id*. at 328. The dissent pointed out that error correction is not necessarily barred by the rule, which by its very terms provides that the absence of an enumerated factor is not an assurance that the petition for review will be denied. *See id*. at 329 (Day, J., dissenting).

The supreme court's orders granting or denying petitions for review do not state the reasons for the court's actions, but several cases that have considered the reviewability of certain types of issues reveal certain patterns. First, the supreme court ordinarily will not review a court of appeals decision that affirms or reverses a circuit court's evidentiary finding. *See Hagenkord v. State*, 100 Wis. 2d 452, 458, 302 N.W.2d 421 (1981). This approach recognizes the error-correcting role of the court of appeals and a basic philosophy that court of appeals decisions on questions of fact usually should be final. *Id.*; *see also State v. Woods*, 117 Wis. 2d 701, 721, 345 N.W.2d 457 (1984).

In addition to rejecting routine review of factual determinations, the supreme court has stated that it will not ordinarily review court of appeals decisions that only involve the proper exercise of discretion by the circuit court. *State v. Outlaw*, 108 Wis. 2d 112,

120, 321 N.W.2d 145 (1982). And, as a general rule, the supreme court will not review discretionary decisions of the court of appeals. *See State v. McConnohie*, 113 Wis. 2d 362, 369, 334 N.W.2d 903 (1983). These limitations on review of discretionary acts and fact-finding decisions seem to be equally applicable to criminal and civil cases.

Thus, the critical determinant in whether a petition for supreme court review is granted is usually whether the petition raises an issue of law. A petition that does so has a greater chance of being granted than a petition that presents issues of fact or discretion.

F. Statement of Case [§ 23.10]

A petition for supreme court review must contain a statement of the case. Wis. Stat. § 809.62(2)(d). Like the statement of the case in a brief under Wis. Stat. § 809.19(1)(d), *see supra* § 11.13, the statement in the petition must describe the nature of the case and the procedural history leading up to review. The statement must indicate the prior disposition in both the court of appeals and the circuit court. Unlike a brief, the statement of facts required in a petition's statement of the case need only include those facts (with citations to the record) necessary to supplement the facts presented in the court of appeals' opinion. Wis. Stat. § 809.62(2)(d). Consequently, a lengthy statement of facts in addition to the procedural facts is ordinarily unnecessary. The petition should identify the portions of the court of appeals' opinion that set forth the necessary facts.

Note. The court of appeals' opinion must be included in an appendix to the petition. Wis. Stat. § 809.62(2)(f)1.; *see infra* § 23.12.

G. Argument [§ 23.11]

After setting forth the statement of the case, the petition must provide an argument section amplifying the reasons relied on to support the petition. Wis. Stat. § 809.62(2)(e). The argument section lets the petitioner elaborate on the criteria for review. *See supra* § 23.9. The argument serves two purposes: (1) it shows lower-court error, and (2) it characterizes that error to emphasize that the case presents issues that are suited to the supreme court's primary role of developing and clarifying the law. It is important to show the court that the petition seeks more than error correction; an error-correction case will ordinarily not be accepted for review.

The argument should stress the criteria in Wis. Stat. § 809.62(1r), rather than the merits of the issues. Although the merits must be considered to give the discussion about the criteria for review a meaningful context, focusing on the criteria is more likely to convince the court to invoke its discretionary appellate jurisdiction. *See* Joseph M. Wilson & Gregory S. Pokrass, *Discretionary Review by the Supreme Court*, Wis. Bar Bull., Feb. 1983, at 16, 17.

In discussing the criteria for review, the argument section should explain why the criteria should cause the supreme court to grant review. It is not enough just to list the criteria and assert that they apply. The discussion should show how the criteria relate to the allegations of error and the facts of the case.

Many petitioners forget that they are seeking review of the court of appeals' decision and direct their arguments at circuit court error as if they were simply seeking an alternative review in the supreme court. The argument must address the actions of *both* the circuit court and the court of appeals. The court of appeals is the court that is actually being reviewed, but the circuit court's actions also must be considered if the court of appeals' decision is to be understood.

Each issue in the argument should be headed by a one-sentence summary identical to the one-sentence summaries used in the petition's table of contents. These summaries let the court see the arguments at a glance and allow the court to focus on the issues it deems most important.

Other tips on constructing an argument in a petition for review parallel those for an argument in a brief. *See supra* § 11.14. The argument should begin with the most important issue, limit the discussion to the key issues, be brief, and never incorporate by reference an argument made in a circuit court or court of appeals brief.

H. Appendix [§ 23.12]

Wis. Stat. § 809.62(2)(f) (intro.) requires a petition for supreme court review to be supported by an appendix, filed as a separate document, that includes the following items *in the order listed*:

1. The decision and opinion of the court of appeals;

2. The judgments, orders, findings of fact, conclusions of law, and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition;

3. Any other portions of the record necessary for an understanding of the petition; and

4. A copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b).

An attorney for the petitioner, in a proceeding that is not included in the supreme court's e-filing pilot project, may also file an electronic copy of the appendix, using the procedure under Wis. Stat. § 809.19(13) (2019–20). *See* Wis. Sup. Ct. Orders 19-02A, 20-07A, 2021 WI 62, ___ Wis. 2d ___ (In re Interim Court Rule Governing Electronic Filing in the Supreme Court) (eff. July 1, 2021); *see also* Wis. Stat. § 809.801(8); *supra* §§ 22.4, 18.3 (e-filing).

V. Response and Cross-review
[§ 23.13]

An opposing party may file a response to the petition for review within 14 days after service of the petition. Wis. Stat. § 809.62(3). A copy of any unpublished opinion cited in the response must be included in an appendix. *Id.* In a case under Wis. Stat. § 809.30, if the petition is filed under the no-merit procedure of Wis. Stat. § 809.32(4), any response must be filed within 14 days after service of the *supplemental petition*. *See supra* §§ 19.27–.29.

If a response to a petition for review is filed, it may include the following:

1. Any reasons for denying the petition, Wis. Stat. § 809.62(3)(a);

2. Any perceived defects that may prevent the court from ruling on the merits of the petition, Wis. Stat. § 809.62(3)(b);

3. Any perceived misstatements of fact or law in the petition, Wis. Stat. § 809.62(3)(c);

4. Any alternative ground for supporting the court of appeals' result or a result less favorable to the petitioner than that granted by the court of appeals, Wis. Stat. § 809.62(3)(d); and

5. Any other issues the court may need to decide if a petition is granted, including whether and how they were raised before the court of appeals and whether and how the court of appeals decided the issues, Wis. Stat. § 809.62(3)(e).

Practice Tip. Although the filing of a response is optional, it is advisable. The response should address the above factors in all cases, except those in which the respondent is confident that the petition, standing alone, fails to present justification for supreme court review. It is particularly important to file a response if the respondent believes that there are alternative grounds to support the underlying decision, or if there are issues that need to be decided other than those relied on by the court of appeals. *See State v. Smith*, 2016 WI 23, ¶ 41, 367 Wis. 2d 483, 878 N.W.2d 135; *see also* Wis. Stat. § 809.62(3) Judicial Council Committee cmt.—2008.

As with the petition, the response must comply with the formatting requirements in the rules as adopted on July 1, 2021, including the pagination and length requirements under Wis. Stat. § 809.19(8)(b), (bm), and (c). Wis. Sup. Ct. Orders 19-02A, 20-07A, 2021 WI 62, ___ Wis. 2d ___ (In re Interim Court Rule Governing Electronic Filing in the Supreme Court) (eff. July 1, 2021). The length of the response, exclusive of appendices, cannot exceed 35 pages, if a monospaced font or handwriting is used, or 8,000 words, if a proportional serif font is used. Wis. Stat. § 809.62(4). The response must have a white cover. In cases not included in the supreme court's e-filing pilot project, 10 copies must be filed with the clerk of the supreme court. Wis. Stat. § 809.62(4)(a) (2019–20). As with the petition, in addition to the 10 paper copies, an electronic copy of the response to the petition must be filed if it is

filed by an attorney in a non-pilot-project case. Wis. Stat. § 809.62(4)(b) (2019–20); *see supra* § 22.4. E-filing is optional for self-represented parties. Wis. Stat. § 809.62(4)(b) (2019–20); *see also* Wis. Stat. § 809.801(3); *supra* § 18.3 (e-filing). The time for filing a response to the petition for review may be affected by the timely filing of a motion for reconsideration in the court of appeals. *See* Wis. Stat. § 809.62(1m)(c)–(e).

Just as the focus of the petition should be whether the case satisfies the criteria for review under Wis. Stat. § 809.62(1r) or otherwise warrants supreme court review, *see supra* § 23.11, the response should be limited to the question whether the case should be reviewed in the exercise of the supreme court's discretion. The merits of the underlying case should be discussed only insofar as they relate to this issue.

A party that seeks modification of an adverse court of appeals decision must file a petition for cross-review within the time for filing a petition for review or within 30 days after another party files a petition for review, whichever is later. Wis. Stat. § 809.62(3m). A cross-petitioner has the same rights and obligations as a petitioner. Wis. Stat. § 809.62(3m)(c). If the supreme court allows cross-review, its order granting the cross-petition will generally explain the briefing procedure.

A petition for cross-review is not necessary to defend the result or outcome based on any ground, whether or not that ground was ruled on by either the court of appeals or the circuit court, so long as the supreme court's acceptance of that ground would not change the result or outcome below. Wis. Stat. § 809.62(3m)(b)1. Similarly, a cross-petition is not necessary to assert grounds for relief that are less favorable than those achieved in the court of appeals but more favorable than the result or outcome that might be awarded to the petitioner. Wis. Stat. § 809.62(3m)(b)2.

If a party elects to file both a response and a cross-petition, the party must submit them together in a "Combined Response and Petition for Cross-Review," which must be filed within the time period for filing a cross-petition. Wis. Stat. § 809.62(4m).

There is no provision for filing a reply to a response to a petition for review. If a petitioner believes a reply is necessary because, for example, the response raises a new issue or completely misstates the facts or law, the petitioner may file a motion for leave to file a reply, accompanied by the reply itself. Replies should be brief and should be filed only in unusual circumstances.

VI. Decision on Petition [§ 23.14]

The procedure the supreme court follows in deciding petitions for review is described in its internal operating procedures. *See infra* ch. 27. At least three justices must vote in favor of granting a petition for review. Four votes are needed before a case can bypass the court of appeals.

The importance of the criteria in Wis. Stat. § 809.62(1r) to the court's decision has been stressed elsewhere. *See supra* § 23.9. Whether the court will grant a petition is also greatly influenced by its caseload at the time the petition is filed. If a party is fortunate enough to file a petition that satisfies the criteria for review in a month in which few other worthy petitions are filed, it is more likely that the petition will be granted. But if the same petition is filed in a month during which many arguably qualified petitions for review are filed, there is a real risk that the petition may be denied because the court will arbitrarily limit the number of petitions granted.

Comment. The court's fear of being inundated has led to considerable discrepancy in the quality of the petitions it grants. To control its calendar, the court may deny arguably meritorious petitions and then may end up granting petitions for little apparent reason other than filling its calendar. Some of these calendar-filling cases, or cases that, on reflection, do not present law-development issues may later be dismissed as improvidently granted. *See, e.g.*, *Furuseth v. Lowe*, 101 Wis. 2d 565, 304 N.W.2d 766 (1981).

In addition to the criteria for review and the supreme court's caseload, a factor that may greatly influence the decision to grant review is whether the court of appeals' opinion was published. The supreme court may strongly disagree with a court of appeals decision, but if the opinion is unpublished (and therefore without precedential value), the supreme court may question whether its review would serve a law-development function. Counsel should anticipate and address this concern in their petitions for review. The mere fact of nonpublication does not necessarily mean there is no harm because the court of appeals uses its unpublished decisions as internal, albeit nonbinding, precedent. Moreover—even though not precedent—authored, unpublished opinions may be

cited for persuasive value pursuant to Wis. Stat. § 809.23(3)(b). *See supra* § 17.4 (describing rule allowing limited citation of unpublished opinions issued after July 1, 2009).

If three justices agree that review should be granted in a particular case, the court issues an order granting the petition and setting forth the procedure for the review. If not preempted by the procedure set forth in the order, the rules governing procedures in the court of appeals apply. Wis. Stat. § 809.63.

Orders granting petitions for review generally follow a standardized form. The court may also specifically limit review to one or two of the issues presented in the petition or cross-petition and may even order briefs on an issue the parties did not raise. Wis. Stat. § 809.62(6). Issues not previously raised in a petition or cross-petition cannot be raised or argued without the court's permission. *Id*.

If the supreme court limits the issues it will consider and does not include an issue raised in a petition for review but not decided by the court of appeals, the supreme court will remand that issue to the court of appeals upon remittitur, unless the issue has become moot or would have no effect. *Id*.

Sometimes the order granting a petition will state that the briefs filed in the court of appeals are also sufficient for the supreme court's review. More often, the parties are given an option of filing a new brief or relying on the court of appeals briefs. In either event, the parties generally must file additional copies of the court of appeals briefs. The briefing schedules, if any, are set forth in the order granting the petition for review.

When given the option of filing a new brief, counsel usually should take advantage of it. The opportunity to argue the merits of a case before the supreme court comes infrequently and, consistent with the different functions of the court of appeals and supreme court, it makes sense to file a brief in the supreme court that is specifically geared to that court's function. Moreover, an attorney whose petition for review is granted arguably owes an institutional duty, beyond that owed to the client, to participate fully in the larger policy-oriented aspects of supreme court review. Even if a new brief is not filed, counsel who is unprepared to discuss these matters at oral argument (which is held in the majority of cases where review is granted) will hinder the client's cause.

Sometimes the supreme court summarily disposes of a matter on the merits in its order granting a petition for review. This occurs most frequently in cases in which the supreme court overrules a court of appeals order dismissing an appeal for a jurisdictional or procedural defect.

If the court does not sua sponte dispose of a petition summarily, once the petition has been granted and the cause set for decision on the merits, there is little reason to file a motion for summary disposition. The reasons that prompted the court to grant review usually warrant a published opinion upon completion of the full appellate process. Wilson & Pokrass, *supra* § 23.11, at 18.

Denial of a petition for review implies neither approval nor disapproval of the court of appeals' decision. *See W.W.W. v. M.C.S. (In re Paternity of C.A.S.)*, 156 Wis. 2d 446, 458, 456 N.W.2d 899 (Ct. App. 1990), *aff'd*, 161 Wis. 2d 1015, 468 N.W.2d 719 (1991). Denial simply means that the petition does not satisfy the criteria for further review. Moreover, denial of a petition for review does not preclude the supreme court from considering the same issue later in response to another petition for review. *Southern Cross, Inc. v. John*, 193 Wis. 2d 644, 647, 533 N.W.2d 188 (1995). Denial of a petition for review does not establish law of the case or amount to res judicata (claim preclusion). *Id.*

Supplement Chapter 24
Bypass to the Supreme Court

Book section supplemented: 24.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

24.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 24
Bypass to the Supreme Court

I. Scope
[§ 24.1]

The rules of appellate procedure recognize three methods by which a case may bypass the court of appeals and go directly to the supreme court. The first is by a petition to bypass pursuant to Wis. Stat. § 809.60. The second and third are bypass upon certification of the court of appeals and bypass upon motion of the supreme court, both pursuant to Wis. Stat. § 809.61. [1]

Bypass on motion of the supreme court occurs so rarely that no further discussion is warranted. This chapter focuses, instead, on bypass by petition and bypass on certification of the court of appeals.

In the 2020–21 term, the supreme court granted approximately 67% of the certifications and approximately 31% of the petitions for bypass. *Wisconsin Supreme Court Annual Statistical Report: 2020–2021 Term*, https://www.wicourts.gov/sc/DisplayDocument.pdf?content=pdf&seqNo=439770. (In the 2019–20 term, the supreme court granted no certifications or petitions for bypass at all. *Id.*) Certifications and bypass petitions constituted less than 4% of the reviews the supreme court disposed of during the 2020–21 term. *Id.*)

II. Criteria for Bypass [§ 24.2]

Neither Wis. Stat. § 809.60, concerning petitions to bypass, nor Wis. Stat. § 809.61, concerning bypass by certification of the court of appeals, specifies the criteria to be addressed or considered. The case law is similarly unilluminating, although the supreme court has stated that bypass, at least by certification or the supreme court's own motion, is not likely to occur absent "unusual circumstances." *State v. Shillcutt*, 119 Wis. 2d 788, 806, 350 N.W.2d 686 (1984); *J.S.R. v. State (In the Int. of J.S.R.)*, 111 Wis. 2d 261, 263, 330 N.W.2d 217 (1983). One authority has recommended that the court enunciate specific criteria to regulate bypass on certification, with an eye to expanding the number of cases certified and eliminating duplication of effort between appellate courts. *See* Richard S. Brown, *Allocation of Cases in a Two-Tiered Appellate Structure: The Wisconsin Experience and Beyond*, 68 Marq. L. Rev. 189 (1985).

The supreme court's practice indicates that, to be appropriate for bypass, a matter generally must satisfy one or more of the criteria for petitions for review under Wis. Stat. § 809.62(1r). *See generally* Joseph M. Wilson & Gregory S. Pokrass, *Discretionary Review by the Wisconsin Supreme Court*, Wis. Bar Bull., Feb. 1983, at 16, 17; *see also supra* § 23.9. This requirement is recognized by the court's internal operating procedures. *See infra* ch. 27.

As noted in section 23.9, *supra*, the criteria for petitions for review under Wis. Stat. § 809.62(1r) primarily reflect the supreme court's role of developing and clarifying the law, while leaving error correction primarily to the court of appeals. Under this two-tiered appellate court system, the petition for bypass—even more so than a petition for review—should not seek error correction. If a case is to be uprooted from the normal appellate process and receive the top priority that bypass to the supreme court signifies, it should present issues of law or policy that probably would have reached the supreme court even if the court of appeals had issued a decision. The requirement that bypass be approved by four members of the supreme court, as opposed to only three for ordinary review, clearly reflects that bypass should be limited to cases with issues of special significance to the legal system.

Examining two cases in which the supreme court granted bypass gives some idea of the types of issues on which review may be successfully sought. In *Sorensen v. Jarvis*, 119 Wis. 2d 627, 350 N.W.2d 108 (1984), the court granted a petition for bypass in a case involving whether a party injured by an intoxicated driver had a cause of action against a retail vendor of alcohol beverages. The court noted that it granted the bypass, not to determine a routine pleading issue, but to determine whether public policy would be better served by finding a cause of action against the vendor or by placing the entire responsibility on the alcohol consumer. *Id*. at 631–32.

In *State v. Firkus*, 119 Wis. 2d 154, 155, 350 N.W.2d 82 (1984), a bypass by certification was granted in a case that raised what the supreme court termed an important issue in the administration of criminal justice: At what point is a convicted misdemeanant entitled to release pending appeal? Another reason for granting bypass in *Firkus* was to clarify the supreme court's position on a controlling court of appeals decision on the issue of right to release that, although never directly reviewed by the supreme court, arguably had been overruled sub silentio by supreme court decisions. *Id*. at 157.

Sorensen and *Firkus* clearly demonstrate the emphasis in supreme court review on the development and clarification of the law. They are perfect examples of cases that present issues of law and policy going beyond the individual concerns of the parties.

If an attempt to bypass the court of appeals is unsuccessful, neither the parties nor the court of appeals should draw any conclusions from this regarding the merits of the particular case. *See Shillcutt*, 119 Wis. 2d at 806. A denial of a petition for bypass means only that "unusual circumstances" are not present. *Id*.

Note. One statute confusingly provides that the supreme court "shall give preference" to certifications in appeals concerning electronics and information technology manufacturing zones but indicates that, even so, the supreme court can deny the certification. *See* Wis. Stat. § 809.104(2)(f)5.

III. Petition for Bypass [§ 24.3]

The procedure for seeking bypass is set forth in Wis. Stat. § 809.60. Under Wis. Stat. § 809.60(1)(a), a petition for bypass must be filed with the clerk of the supreme court no later than 14 days after the filing of the respondent's brief under Wis. Stat. § 809.19. Supreme court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent's brief is filed will be dismissed as premature. This policy limits the time for filing a petition for bypass to the 14-day period following the filing of the respondent's brief in the court of appeals.

In other proceedings, such as those for supervisory relief, a petition for bypass must be filed no later than 14 days after the filing of any response. Wis. Stat. § 809.60(1)(a). As a practical matter, however, a petition filed 14 days after the response might be too late because the court of appeals does not delay its decisions for 14 days to see whether a bypass petition will be filed.

Note that the supreme court will not grant a petition to bypass the court of appeals on the issue whether to grant a permissive appeal. *J.S.R. v. State (In the Int. of J.S.R.)*, 111 Wis. 2d 261, 263, 330 N.W.2d 217 (1983). (The supreme court will, however, consider a certification by the court of appeals on the issue whether to grant a permissive appeal. *Id*.)

The rules of appellate procedure are silent about the contents of a petition to bypass, except for the general directive that the petition include a statement of reasons for bypassing the court of appeals. Wis. Stat. § 809.60(1)(a). Although the petition need not be as formal as a brief or petition for review under Wis. Stat. § 809.62, it should nonetheless contain all the information the court needs to make an intelligent, informed decision on the petition. In addition to stating the reasons for seeking bypass, this information should state the issues and state the facts necessary to understand the issues.

Because the supreme court's practice is to evaluate a bypass request in light of the criteria for review outlined in Wis. Stat. § 809.62(1r), the statement of reasons should focus on the need for bypass as part of the supreme court's law-development function, which is reflected in the criteria. Those criteria are not all-inclusive, but they do provide a useful framework for presenting a bypass argument. Bypass should not be sought in cases involving only error correction, which is the principal responsibility of the court of appeals.

An opposing party may file a response to the petition for bypass within 14 days after service of the petition. Wis. Stat. § 809.60(2). Although filing a response is optional, the preferred practice is always to file one, even if the reason for doing so is simply to indicate that there is no objection to the petition.

Parties sometimes file joint petitions for bypass. It does not appear that this materially increases the chance that the petition will be granted.

Filing a petition for bypass stays the court of appeals from taking the appeal or other proceeding under submission. Wis. Stat. § 809.60(3). This essentially means the court of appeals cannot decide a case once a petition for bypass is filed. In all other respects, however, the case continues on its normal course until the supreme court makes a decision on the petition. Thus, the filing of a petition for bypass does not stay the briefing schedules or any other requirement under Wis. Stat. § 809.19.

If the supreme court denies the petition for bypass, the matter continues as if no petition had been filed. Wis. Stat. § 809.60(5). If the court grants the petition, the court's order will inform the parties of any procedural variations that might be necessary.

Although the court of appeals typically specifies certain issues or questions when it seeks bypass by certification, once the supreme court accepts certification, it takes jurisdiction over the entire appeal, not merely the questions certified. *American Fam. Mut. Ins. Co. v. Golke*, 2009 WI 81, ¶ 18, 319 Wis. 2d 397, 768 N.W.2d 729.

If there is a tie decision on the merits of a case that has reached the supreme court on bypass or certification, the supreme court will remand the matter to the court of appeals. *Guzman v. St. Francis Hosp., Inc.*, 2000 WI 34, ¶ 2, 234 Wis. 2d 170, 609 N.W.2d 166.

Supplement Chapter 25
Original Actions in the Supreme Court

Book sections supplemented: 25.1 and 25.3

25.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

25.3 Procedure

Page 3: Added paragraph after first paragraph after numbered list in section

The use of original actions in the supreme court had been uncommon until 2020, when amid the COVID-19 pandemic and resulting governmental actions, an unprecedented surge of petitions occurred and an unprecedented number of petitions were

granted. *See* Colin Thomas Roth, *Wisconsin Supreme Court Jurisdiction: Original Actions*, Wis. Law., Oct. 2022, at 28. As the pandemic has subsided, however, the court seems to have returned to the more highly restrictive view of former years. *Id.* at 31–32.

Chapter 25
Original Actions in the Supreme Court

I. Scope
[§ 25.1]

The normal progression of judicial review provides for a case to originate in the circuit court (or perhaps an administrative body), from which it must then proceed through the court of appeals before the supreme court will consider the matter. The concept of original jurisdiction allows cases involving matters of great public importance to be commenced in the supreme court in the first instance. Although rarely invoked, original jurisdiction may provide an effective review opportunity, particularly when time is of the essence.[1]

This chapter begins with a summary of the extent of the supreme court's original jurisdiction and how it developed. The chapter then describes the procedure to follow when commencing an original action in the supreme court.

II. Extent of Original Jurisdiction [§ 25.2]

Defining the parameters of the supreme court's original jurisdiction with any exactitude is virtually impossible. The most exhaustive attempt by the Wisconsin Supreme Court to analyze the concept of original jurisdiction took place in *Petition of Heil*, 230 Wis. 428, 284 N.W. 42 (1939). In that case, the court noted that original jurisdiction had initially encompassed only prerogative jurisdiction (i.e., cases involving the sovereignty of the state). From there, original jurisdiction grew to include superintending jurisdiction over inferior tribunals and ultimately to cover *publici juris* cases—i.e., cases that, in the court's judgment, have a sufficiently important effect on the public to warrant an exercise of original jurisdiction. *Id*. at 443.

It is this last class of cases—those with no aspects of the initial prerogative basis for original jurisdiction—that now constitutes the bulk of original actions considered in the supreme court. According to the *Heil* case, this has occurred because the earlier boundaries of original jurisdiction were impractical and difficult to maintain with any degree of certainty. *Id*.

To lend some certainty to the matter, the court in *Heil* adopted the *publici juris* view of original jurisdiction as the only significant limitation on that jurisdiction. Therefore, whether a matter comes within the supreme court's original jurisdiction is determined case by case by considering whether the issues so importantly affect the rights and liberties of the people of Wisconsin as to warrant the supreme court's intervention. *Id*. at 445. There must also be a strong showing of exigency to support the bypass of the lower courts. *Id*. at 443.

Heil simplified the concept of original jurisdiction in the supreme court by eliminating reliance on elements of prerogative or sovereignty, which have been subsumed into the larger concept of *publici juris*. *Heil* does not simplify the court of appeals' original jurisdiction, however, because that is expressly limited to the issuance of prerogative writs. *See supra* § 2.4.

III. Procedure
[§ 25.3]

Wis. Stat. § 809.70 sets forth the procedure for commencing an original action in the supreme court. The petition must be served by traditional means because it commences a new action. Wis. Stat. § 809.70(1)(intro.). A party may file a petition for original action in the supreme court, requesting the court to take jurisdiction. The petition may be supported by a memorandum and must contain statements of

1. The issues,

2. The facts necessary to understand the issues,

3. The relief sought, and

4. The reasons the court should take jurisdiction.

The petition should focus on why the matter is *publici juris* and why the supreme court's immediate attention is warranted. An example of an original action the supreme court heard on the merits is *Labor & Farm Party v. Elections Board*, 117 Wis. 2d 351, 344 N.W.2d 177 (1984), which involved the former state election board's refusal to list the Labor and Farm Party candidate for president on the election ballot. The board's decision occurred only two months before the election. The court granted the petition because there was an exigency (the ballots were about to be printed, and the election was forthcoming), the matter was *publici juris* (the eligibility of the candidate of a recognized political party for a statewide ballot was at issue), and the petitioner had moved with dispatch to bring the matter before the court. *Id*. at 354. The last reason illustrates that, although there is no time period per se for filing a petition for original action, speedy application is required if the exigency is not to be of the petitioner's own making. In fact, the supreme court denied another petition for original action in an election ballot case on grounds that it lacked sufficient time to fully consider the matter and that the petitioners' delay contributed to that problem. *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶¶ 5, 10, 393 Wis. 2d 629, 948 N.W.2d 877; *see also Wisconsin Small Bus. United Inc. v. Brennan*, 2020 WI 69, ¶ 32, 393 Wis. 2d 308, 946 N.W.2d 101 (holding that two-year delay in challenging governor's partial veto was unreasonable delay warranting application of laches doctrine).

The relief sought in an original action is of two main types. First, a petition for original action often seeks relief through well-recognized prerogative or supervisory writs such as mandamus or prohibition. *See generally supra* § 10.2. This occurred in the *Labor & Farm Party* case, in which mandamus was sought to require that a candidate's name be on the ballot. Second, a petition for original action is often used to obtain a declaratory judgment. *See, e.g.*, *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976) (seeking declaration of rights concerning governor's power of partial veto). It appears that the supreme court has broad power to grant any appropriate relief in an original action.

The supreme court may deny the petition ex parte or may order a response. The court may also, and generally does, order oral argument on the question whether to take original jurisdiction. The response must be filed within 14 days after service of the supreme court's order. Wis. Stat. § 809.70(2). Although the rules of appellate procedure place no page limits on the petition or response, they should be kept as short as possible.

The petition and response may be supported by a memorandum. Wis. Stat. § 809.70(1), (2). The memorandum should set forth the merits of the underlying case in detail.

The court sometimes decides the entire case—including whether to grant jurisdiction and, if so, whether to grant relief—on the basis of the petition and response. Sometimes, the court will simply decide the jurisdictional issue and, if jurisdiction is granted, will order pleading, briefing, and possible oral argument. Wis. Stat. § 809.70(3). The freedom of the supreme court to handle original jurisdiction matters as it deems appropriate can be seen in a controversial decision in which the supreme court granted review based on original jurisdiction and decided the merits of the case in its order granting review, even though the case was not presented as a petition for original jurisdiction but as a petition for supervisory relief seeking review of the circuit court. *See State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436.

Other courts may be barred from taking any action on the subject matter of a case once the supreme court accepts original jurisdiction. *Petition of Heil*, 230 Wis. 428, 445–46, 284 N.W. 42 (1939). The rules of appellate procedure do not provide for temporary relief pending determination of a petition seeking original jurisdiction in the supreme court, but temporary relief presumably is available in the discretion of the court.

Supplement Chapter 26
Supervisory Relief in the Supreme Court

Book section supplemented: 26.1

Note: In the opinion of the author, as of the time this supplement went to press, there had been no significant legal developments affecting this chapter since the 2021–22 revision.

26.1 Scope

Page 1: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

Chapter 26
Supervisory Relief in the Supreme Court

I. Scope
[§ 26.1]

The supreme court has supervisory jurisdiction over all other courts, encompassing the traditional writs such as mandamus to compel an act and prohibition to prevent an act. In both substance and procedure, supervisory relief in the supreme court is governed by the same standards applied in the court of appeals. *See supra* ch. 10.[1]

II. General Prerequisites and Procedures [§ 26.2]

Common law establishes the requirements for supervisory relief. The test for granting supervisory relief applicable to both the court of appeals and supreme court is discussed in section 10.2, *supra*. *See State ex rel. CityDeck Landing LLC v. Circuit Ct. for Brown Cnty.*, 2019 WI 15, ¶ 30, 385 Wis. 2d 516, 922 N.W.2d 832.

Wis. Stat. § 809.71(1) provides that a party seeking supervisory relief in the supreme court must file a petition in accordance with Wis. Stat. § 809.51, which also governs petitions for supervisory relief in the court of appeals. The procedure under Wis. Stat. § 809.51 is described in section 10.3, *supra*.

Note. Proceedings for supervisory writs commence a new action that must be served on the respondents by the initiating party using traditional methods (i.e., not electronically). *See* Wis. Stat. § 809.71 cmt.—2021.

Consistent with the basic stricture that supervisory relief will not lie when an adequate alternative remedy exists, a petitioner seeking supervisory relief in the supreme court must have sought it first in the court of appeals, unless it is impractical to do so. Wis. Stat. § 809.71(1). It is difficult to conceive of a situation in which it would be impractical to first seek relief in the court of appeals, except when the relief is for some action by the court of appeals itself. Because supervisory relief is discretionary and Wis. Stat. § 809.71(1) appears to envision a review by the supreme court of a court of appeals decision on a petition for supervisory relief (rather than a de novo review), it should be a rare case in which the supreme court grants supervisory relief of a case that has not been reviewed by the court of appeals.

A petition for supervisory relief in the supreme court must show why it is impractical to seek relief in the court of appeals or, if such relief has been sought, what decision the court of appeals reached and the reasons that court gave for its decision. Wis. Stat.

§ 809.71(1). As an alternative to filing a petition for supervisory relief in the supreme court, the petitioner may seek review of a final court of appeals decision by filing a petition for review pursuant to Wis. Stat. § 809.62. *See supra* ch. 23. In a rare example, the supreme court granted supervisory relief against the court of appeals when the court of appeals denied a selection of venue pursuant to Wis. Stat. § 752.21(2). *State ex rel. DNR v. Wisconsin Ct. of Appeals*, 2018 WI 25, 380 Wis. 2d 354, 909 N.W.2d 114. The supreme court deemed relief appropriate on the ground that there was a plain duty, there was an inadequate remedy by petition for review, and denial of the appropriate venue would cause irreparable harm. *Id.*

The existence of an alternative remedy by petition for review apparently does not preclude the filing of a petition for supervisory relief in the supreme court. *See State ex rel. Newspapers, Inc. v. Milwaukee Cnty. Cir. Ct.*, 124 Wis. 2d 499, 504 n.2, 370 N.W.2d 209 (1985). It also appears that the supreme court has ignored the Wis. Stat. § 809.71(1) requirement that a petition for supervisory relief be brought first in the court of appeals. *State ex rel. Unnamed Petitioners v. Connors*, 136 Wis. 2d 118, 123, 401 N.W.2d 782 (1987), *overruled on other grounds by State v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989). There is no record that the supreme court made a finding in *Connors* that it would have been impractical for the petitioner to seek relief in the court of appeals. But see *State ex rel. Universal Processing Services of Wisconsin, LLC v. Circuit Court of Milwaukee County*, 2017 WI 26, ¶¶ 41–44, 374 Wis. 2d 26, 892 N.W.2d 267, in which the supreme court declined to grant review based on its supervisory authority, rejecting the petitioner's claim that it was impractical to first seek relief in the court of appeals because that court had denied its petition for leave to appeal under Wis. Stat. § 809.50. Noting that its superintending authority over the court system is broader than the supervisory authority set forth in Wis. Stat. § 809.71(1), the supreme court granted review on that alternative basis. *Id.* ¶¶ 45–50; *see also supra* § 2.7.

Supplement Chapter 27
Wisconsin Supreme Court Internal Operating Procedures

Book sections supplemented: 27.1, 27.21, and 27.34

27.1 Introduction

Page 3: Amended date in first sentence in Note

Note. This chapter is a reprint of the internal operating procedures of the Wisconsin Supreme Court (updated through Apr. 30, 2023), although the outline structure has been altered slightly for the purposes of this book. For the official outline numbering and structure of the internal operating procedures, and for any updates, readers should consult the website of the Wisconsin Court System, at https://www.wicourts.gov/sc/IOPSC.pdf.

27.21 [Decisional Process—Appellate and Original Jurisdiction] [Staff Analysis and Reporting] Mail-in Conference Procedure

Page 11: Replaced last paragraph in section

Within five calendar days after the deadline for email votes, all justices shall vote, by e-mail, to grant, to deny, hold for discussion, or request additional information relative to the suggestions in the commissioner's report. If sufficient votes to grant the matter remain, the grant order shall issue within two business days, unless a majority votes to hold for a discussion, in which case the petition shall be held for discussion at a future in-person conference. If the matter no longer has the requisite votes to grant, a justice may hold the matter for discussion during the next in-court conference.

27.34 [Decisional Process—Appellate and Original Jurisdiction] [Opinion] Revisions to Majority

Opinions; Separate Writings; Procedure for Mandating Opinions

Pages 18–19: Replaced fourth paragraph in section

If during this process the opinion originally circulated as the majority opinion does not garner the vote of a majority of the court, it shall be referred to in separate writings as the "lead opinion" unless a separate writing garners the vote of a majority of the court on all issues sufficient to resolve the case fully. If a separate writing garners the vote of a majority of the court on all issues sufficient to resolve the case fully, it shall be revised as the majority opinion within 14 days of the vote of the court. Within 7 days of the circulation of this majority opinion, the opinion initially circulated as the majority opinion and other separate writings shall be revised and indicate their status as concurrences or dissents to the new majority opinion.

Chapter 27
Wisconsin Supreme Court Internal Operating Procedures

I. Introduction
[§ 27.1]

Note. This chapter is a reprint of the internal operating procedures of the Wisconsin Supreme Court (updated through June 30, 2021), although the outline structure has been altered slightly for the purposes of this book. For the official outline numbering and structure of the internal operating procedures, and for any updates, readers should consult the website of the Wisconsin Court System, at https://www.wicourts.gov/sc/IOPSC.pdf.

These internal operating procedures, which were adopted May 24, 1984, and amended thereafter, describe the manner in which the Supreme Court currently processes, considers and decides judicial matters brought to the court. They also set forth the administrative and professional staff function in the conduct of the court's judicial business and the procedure by which the Supreme Court administers the non-judicial business of the court. These procedures are intended to structure the internal operations of the court, to advise counsel practicing before the Supreme Court and to inform the public. They are not rules of appellate procedure.

Following court reorganization in 1978, the court experimented with various procedures that seemed to best serve the objectives of collegiality and efficiency. The court continually reviews its procedures to improve the efficient processing of its caseload and the effective discharge of its administrative responsibilities. Accordingly, these procedures may be changed without notice as circumstances require.

It should be reemphasized that these are not rules. They do not purport to limit or describe in binding fashion the powers or duties of any Supreme Court personnel. These internal operating procedures are merely descriptive of how the court currently functions. Any internal operating procedure may be suspended or modified by majority vote of a quorum of the court.

II. Chief Justice [§ 27.2]

Pursuant to Article VII, Section 4(2) of the Wisconsin Constitution [Wis. Const. art. VII, § 4(2)], the chief justice of the Supreme Court is elected for a term of 2 years by a majority of the justices then serving on the court. Pursuant to Article VII, Section 4(3) of the Wisconsin Constitution [Wis. Const. art. VII, § 4(3)], the chief justice of the Supreme Court is the administrative head of the judicial system and shall exercise this administrative authority pursuant to procedures adopted by the Supreme Court.

The chief justice may delegate portions of the chief justice's duties to another justice. If the chief justice is unwilling or unable to perform the duties of the chief justice, the delegee of the chief justice is to perform the duties of the chief justice. Under those circumstances, the term "chief justice" in the following Internal Operating Procedures is hereby defined as including the delegee when the chief justice is not acting.

III. Staff [§ 27.3]

A. Administrative [§ 27.4]

1. Director of State Courts [§ 27.5]

The director of state courts, who is appointed by and serves at the pleasure of the court, administers the nonjudicial business of the court system at the direction of the chief justice and the court. The authority and responsibilities of the director are set forth in the Supreme Court Rules, chapter 70 [SCR ch. 70].

2. Clerk [§ 27.6]

The clerk of the Supreme Court, who is appointed by the Supreme Court, performs the duties of the office prescribed by law and such other duties as may be prescribed by the court or the chief justice. The clerk is the custodian of all court records and is responsible for the supervision and processing of matters from the time of filing with the court until their ultimate disposition. The clerk is also clerk of the Court of Appeals, and the clerk's office serves both courts. The clerk is responsible for implementing modes of filing in the Supreme Court and Court of Appeals, such as efiling, that are adopted by the Supreme Court.

3. Chief Deputy Clerk [§ 27.7]

The chief deputy clerk, who is hired by the clerk of the Supreme Court, assists the clerk in the performance of the duties of that office and performs those duties in the absence of the clerk.

4. Marshal [§ 27.8]

The marshal, who is hired by the director of state courts with the advice and approval of the Supreme Court, attends the public sittings of the court and performs the duties assigned by the chief justice, the court and the director of state courts.

5. Deputy Marshal [§ 27.9]

The deputy marshal, who is hired by the director of state courts with the advice and approval of the supreme court, assists in the performance of the duties of the marshal and, in the absence of the marshal, performs those duties.

B. Legal [§ 27.10]

1. Supreme Court Commissioners [§ 27.11]

Supreme Court commissioners are attorneys licensed to practice law in Wisconsin who are hired by and serve at the pleasure of the court. The commissioners perform research, prepare memoranda and make recommendations to the court regarding matters brought within the court's appellate and original jurisdictions and rule-making authority, and perform other duties as the court or the chief justice may direct. Matters are assigned to the commissioners on a rotating basis.

2. Law Clerks [§ 27.12]

Law clerks assist the justices in performing research. Law clerks are hired by and serve at the pleasure of the individual justice. Law clerks are law school graduates who are customarily hired to serve for one year. Each law clerk performs research, prepares memoranda and performs other duties as the individual justice may direct.

IV. Decisional Process—Appellate and Original Jurisdiction [§ 27.13]

The Wisconsin Constitution confers upon the Supreme Court appellate jurisdiction over all courts and jurisdiction to hear original actions and proceedings. As a corollary, the court has constitutional authority to issue all writs necessary in aid of its

jurisdiction.

The court's appellate jurisdiction is sought to be invoked by the filing of a petition for review of a decision of the Court of Appeals by a party to whom the decision was adverse, by the filing of a petition to bypass the Court of Appeals by a party to the circuit court action to whom the decision was adverse, or by certification by the Court of Appeals of a circuit court order or judgment appealed to the Court of Appeals. The Supreme Court may also, in its discretion, answer questions of law certified to it by a federal court of appeals or the highest appellate court of any state. The Supreme Court exercises its appellate jurisdiction by granting a petition for review, a petition to bypass, or a certification or by deciding on its own motion to review directly a matter appealed to the Court of Appeals. The court's original and superintending jurisdictions are sought to be invoked by the filing of a petition. The court exercises its original or superintending jurisdiction by granting a petition therefor or by ordering the relief sought.

When a matter is brought to the Supreme Court for review, the court's principal criterion in granting or denying review is not whether the matter was correctly decided or justice done in the lower court, but whether the matter is one that should trigger the institutional responsibilities of the Supreme Court. The same determination governs the exercise of the court's original jurisdiction.

A. Court Schedule [§ 27.14]

Subject to modification as needed, in the spring of each year the court sets a schedule for its decisional process for each month from September through June. During each month the chief justice may schedule oral arguments, decision conferences, and administrative conferences on any date in the agreed-upon calendar. Any additional days added to previously agreed-upon court dates need unanimous approval.

B. Staff Analysis and Reporting [§ 27.15]

1. Petition for Review [§ 27.16]

Upon filing in the office of the clerk, petitions for review are assigned by clerk staff to the court's commissioners for analysis prior to the court's consideration of the matters presented. Within 50 days of assignment of the petition, the commissioner to whom a petition for review is assigned prepares and circulates to the court a memorandum containing a thorough legal and factual analysis of the petition, including the applicability of the criteria for the granting of a petition for review set forth in Wis. Stat. § (Rule) [809.62(1r)], a recommendation to grant or deny the petition and, where appropriate, a recommendation for submission of the matter to the court for decision on briefs without oral argument.

In addition to the written memorandum, once each month and at other times as the court may direct, a conference is held at which each commissioner orally reports to the court on the petitions for review for which the court has requested further discussion. Two weeks prior to the conference at which the commissioners report, each commissioner circulates to the court the petitions for review, the responses to those petitions, and a memorandum on each petition, together with an agenda sheet listing by caption and docket number the cases assigned to that commissioner and the commissioner's recommendation in each case. Prior to the conference, each member of the court reads the materials circulated and each justice votes by email at least two full business days prior to the conference date, on all petitions, draft disciplinary decisions, and other matters.

Following discussion, the court decides whether to grant or deny the petition for review and, if the petition is granted, whether the case will be scheduled for oral argument or for submission on briefs and whether the court will limit or expand the issues in the case.

A petition for review is granted upon the affirmative vote of three or more members of the court. The purpose of requiring less than a majority of the court to grant a petition for review is to accommodate the general public policy that appellate review is desirable. A request for a response from a party requires the vote of at least three justices, but it takes the vote of at least four justices to add an issue to those set forth in the petition for review.

The commissioner to whom the petition has been assigned prepares an order setting forth the court's decision on the petition for review and arranges for the issuance of the order by the office of the clerk. If the petition is granted, the order specifies the court's

limitation or expansion of issues, if any, and the briefing schedule. The order provides that a party may file a brief or may stand on the brief filed in the Court of Appeals. A party shall not, in any new brief filed, incorporate by reference any portion of a Court of Appeals brief or a brief submitted with or in response to the petition for review.

2. Wis. Stat. § (Rule) 809.105(11) Petition [§ 27.17]

Upon the filing in the office of the clerk under Wis. Stat. § (Rule) 809.105(11) of a petition for review of a judgment in an appeal of a decision of the circuit court on a petition to waive parental consent prior to a minor's abortion, the clerk shall notify the chief justice that the petition has been filed. As soon as practicable after the petition is filed, the clerk shall furnish a copy of the petition to each justice and assign it, with a copy, to a commissioner.

The commissioner to whom such a petition for review has been assigned shall prepare and circulate to the court within three calendar days of the assignment a memorandum containing a thorough legal and factual analysis of the petition, including the applicability of the criteria for the granting of a petition for review set forth in Wis. Stat. § (Rule) [809.62(1r)], a recommendation to grant or deny the petition and, where appropriate, a recommendation for submission of the matter to the court for decision with or without briefs and with or without oral argument.

Within five calendar days after the filing of such petition for review, the chief justice shall convene a conference of the members of the court, which may be held by telephone conference call, and the court shall issue an order granting or denying the petition for review. An order granting the petition for review shall set forth a date and time for oral argument, if any, to be held in the court's hearing room, and a date and time for the filing of briefs, if the court orders briefs.

If such a petition for review is granted, the court shall issue its decision, with or without a written opinion, within 10 calendar days after the petition for review is filed.

3. Petition to Bypass, Certification and Direct Review [§ 27.18]

A party may request the court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to bypass pursuant to Wis. Stat. § (Rule) 809.60. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) [809.62(1r)], and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.

The Court of Appeals may request the Supreme Court to exercise its appellate jurisdiction by certifying a pending appeal to the Supreme Court prior to hearing and deciding the matter. Certifications are granted on the basis of the same criteria as petitions to bypass.

Petitions to bypass and certifications are processed according to the procedures set forth above for petitions for review, except that these matters are given priority over petitions for review. Petitions to bypass and certifications are granted upon the affirmative vote of four or more members of the court.

Before the court on its own motion decides to review directly a matter appealed to the Court of Appeals, the chief justice may assign the matter to a commissioner for analysis. If the matter is so assigned, it is processed according to the procedures set forth in this section for petitions to bypass and certifications.

4. Original Action [§ 27.19]

Upon filing in the office of the clerk, a petition requesting the court to take jurisdiction of an original action is assigned to a commissioner for analysis prior to the court's consideration of the merits of the matter presented. The commissioner orally reports on the matter to the chief justice as soon as practicable, and the chief justice determines a date on which the matter will be considered by the court at conference. The commissioner reports on the matter at that conference. If time permits, the commissioner circulates a memorandum to the court prior to that conference analyzing the legal and factual issues involved and making a

recommendation to deny the petition ex parte or to order a response. The commissioner also may recommend scheduling oral argument on the question of the court's exercise of its original jurisdiction, if the commissioner concludes that oral argument is necessary. If circumstances warrant, the chief justice may order a response to the petition for original action and may act on non-substantive motions concerning the proceeding.

If the petition is denied, the commissioner prepares an order setting forth that decision and arranges for its issuance through the office of the clerk; if a response is ordered, the commissioner prepares an order setting forth that decision, as well as the decision on oral argument. When the order is approved by the court, the commissioner arranges for its issuance by the office of the clerk. Upon the filing of a response, the matter is referred to the commissioner for analysis and reporting. The original action is then processed according to the procedures set forth above for petitions for review.

A petition to commence an original action is granted upon the vote of four or more members of the court. The criteria for the granting of a petition to commence an original action are set forth in case law. *See, e.g.*, *Petition of Heil*, 230 Wis. 428 (1939). The Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact. Upon granting a petition to commence an original action, the court may require the parties to file pleadings and stipulations of fact. The court customarily holds oral argument on the merits of the action and expedites the matter to decide it promptly.

5. Petition for Supervisory Writ; Petition for Writ of Mandamus, Prohibition, Quo Warranto, Habeas Corpus [§ 27.20]

The Supreme Court has superintending authority over all actions and proceedings in the circuit courts and the Court of Appeals. It does not ordinarily issue supervisory writs concerning matters pending in circuit courts, as the Court of Appeals also has supervisory authority over all actions and proceedings in those courts. A person may request the Supreme Court to exercise its superintending jurisdiction by filing a petition pursuant to Wis. Stat. § (Rule) 809.71.

Petitions for supervisory writ and petitions for writ of mandamus, prohibition, quo warranto, or habeas corpus are processed according to the procedure set forth above for a petition for commencement of an original action, except that if time does not permit consideration by the court, petitions for supervisory writ may be denied ex parte by the chief justice. If it appears from the petition that it should be dismissed on procedural grounds, the chief justice, acting for the court, may deny the petition ex parte.

6. Mail-in Conference Procedures [§ 27.21]

Regarding petitions for review, certifications, petitions to bypass, original actions, petitions for supervisory writ, and petitions for writ of mandamus, prohibition, quo warranto, and habeas corpus, some months are scheduled as mail-in conferences, whereby each justice votes, by e-mail, on the recommendations of each commissioner. When the initial email vote on petitions for review, and drafts of disciplinary decisions and other matters, are due on an identified date, but the court will not be meeting on that date, all email responses are due on the identified date.

A justice who wishes to deny or hold a matter for which a commissioner has recommended granting review must submit in writing, with his or her e-mail votes, the specific reason(s) why he or she would not approve the grant as recommended by the commissioner.

Within five calendar days after the deadline for email votes, all justices shall vote, by e-mail, to grant, to deny, or request additional information relative to the suggestions in the commissioner's report. If sufficient votes to grant the matter remain, the grant order shall issue within two business days. If the matter no longer has the requisite votes to grant, a justice may hold the matter for discussion during the next in-court conference.

7. Regulatory Jurisdiction [§ 27.22]

A matter within the regulatory jurisdiction of the court, *e.g.*, bar admission, continuing legal education, lawyer discipline, judicial discipline, Supreme Court Rules and rules of pleading, practice and procedure in civil and criminal actions, is assigned to a court

commissioner for analysis and reporting to the court. The commissioner shall indicate whether a matter requires a public hearing. The commissioner prepares orders in these matters as the court may direct and arranges for their issuance by the office of the clerk.

8. Motions [§ 27.23]

When acting on motions, the chief justice acts on behalf of the court and pursuant to rules of the Supreme Court promulgated from time to time.

a. Unopposed procedural motions are acted on by the clerk after consultation with a commissioner. Procedural motions which do not adversely affect another party, *e.g.*, motions to extend time to file briefs or to exceed page limitations of briefs, are acted on by the clerk without a response from the adverse party, unless the clerk requests a response. The clerk acts on these motions after consultation with the commissioner to whom the matter has been assigned for analysis and when appropriate, with the chief justice. The clerk or the commissioner prepares an appropriate order.

When appropriate, the commissioner presents a motion to the chief justice with a recommendation to grant or deny the motion, and the chief justice either decides the motion or determines that the matter should be submitted to the court. The commissioner prepares an appropriate order and, when the order is approved, arranges for its issuance by the office of the clerk.

b. Substantive motions are assigned by clerk staff to the court's commissioners for review and reporting to the court, with or without a memorandum, as time may permit and circumstances may indicate. If a motion is filed in a case that has been assigned to a justice, clerk staff transmits the motion to the court. When the motion has been decided, the commissioner or clerk staff, at the court's direction, prepares an appropriate order and, when the order is approved, arranges for its issuance by the office of the clerk.

c. A motion to file a brief by a person not a party to a proceeding is assigned to the commissioner to whom the matter has been assigned for analysis, who may grant the motion if it appears that the movant has a special knowledge or experience in the matter at issue in the proceedings so as to render a brief from the movant of significant value to the court. If the commissioner questions the propriety of granting the motion or if it appears that the motion should be denied, the commissioner reports the matter to the court with a recommendation that it be denied. The decision to deny a motion to file an *amicus* brief is the court's. The commissioner prepares an appropriate order and arranges for its issuance by the office of the clerk.

If a motion is filed in a case that has been assigned to a justice, clerk staff transmits the motion to the court for review and decision. Clerk staff, with the assistance of a commissioner and at the court's direction, prepares and issues an appropriate order.

d. Motions for temporary relief concerning matters pending in the Supreme Court are assigned to the court or to the commissioner to whom the underlying matter has been assigned and with whom it remains at the time of the filing of the motion. The matter is reported to the court or to the chief justice, or in the absence of the chief justice with or without a memorandum, as time and circumstances may indicate. The court or the chief justice decides the motion, and the commissioner or the court prepares an appropriate order and arranges for its issuance by the office of the clerk.

C. Submission Calendar [§ 27.24]

The clerk of the court, in consultation with the chief justice, prepares and distributes to the court for each month from September through June, inclusive, a list of cases for submission to the court that month. The clerk assigns cases to the submission calendar in the order of the anticipated filing of the last brief, except that criminal cases and cases involving child custody and termination of parental rights are given priority to the extent possible. The chief justice sets the cases to be assigned each month based on the court's calendar.

The submission calendar sets the date of oral argument for cases assigned for submission with oral argument and lists cases assigned for submission on briefs. The date of submission of the oral argument cases is the date of oral argument, and the date of submission of cases assigned for submission on briefs is the date set by the chief justice. Generally, cases are assigned for submission with oral argument unless it appears from the issues or the briefs that oral argument would not be sufficiently informative to the court to justify the additional expenditure of court time or cost to the parties or there is another case or cases assigned for submission with oral argument presenting the same issue(s). At least 30 days prior to the first day of oral argument on

the submission calendar, the clerk makes the submission calendar public and distributes a copy of it to the court, to the parties to the cases, and to others who have arranged with the clerk to receive it.

As soon as each month's submission calendar is distributed, the court's marshal delivers a copy of the submission calendar and the briefs filed to date for each case on that calendar to the office of each justice. Each justice's law clerk prepares memoranda thoroughly analyzing the factual and legal issues in the cases on the submission calendar as the law clerk's justice may direct. Prior to oral argument, each justice reads the briefs and legal memoranda in each case on the calendar.

D. Oral Argument [§ 27.25]

After the submission calendar is circulated, each justice is randomly assigned cases on it for purposes of leading the discussion of those cases at post-argument conference on the day of oral argument.

The submission calendar lists those cases to be argued in the morning, beginning at 9:45 a.m., and those cases to be argued in the afternoon, beginning at 1:30 p.m. Attorneys are to be present and prepared to argue at the time indicated, which is the earliest time at which their case may be called. Upon their arrival for oral argument, attorneys are to check in with the marshal outside the courtroom.

When a case is called by the chief justice, counsel are to take their places immediately. The petitioner is to be seated to the right of the podium facing the court and the respondent is to be seated to the left of the podium facing the court.

At oral argument, each side is allowed 30 minutes or such other period of time as the court may grant to present argument supplementing or clarifying arguments set forth in the briefs, to present argument on issues specified by the court prior to oral argument and to discuss developments in applicable law that have occurred subsequent to the filing of the briefs. Requests for additional time for oral argument are to be made in writing to the clerk, but such requests are rarely granted. Oral arguments are recorded by the marshal for the court's use, and the recordings are retained for at least 120 days following remittitur. The court may permit parties or interested persons to listen to the recordings. Oral arguments are posted to the court's website.

The court's marshal monitors the time for oral argument by the use of light signals on the podium.

(a) *Opening Argument*. A green light signals the beginning of the opening argument of the petitioner or other party having the burden of going forward. Twenty-five minutes is allotted for opening argument, leaving five minutes for rebuttal. Five minutes prior to the expiration of the time allowed for opening argument, the green light goes off and a yellow light comes on. When the time reserved for opening argument has expired, the yellow light goes off and a red light comes on, and attorneys are to terminate their arguments immediately. The division of oral argument time in cases with a cross-appeal is to be agreed to by the parties; no more than five minutes may be reserved for rebuttal. A party may cede part of its time to an amicus.

(b) *Respondent's Argument*. The same procedure outlined above for opening argument is used for respondent's thirty minute argument.

(c) *Rebuttal*. A yellow light signals commencement of the time for rebuttal argument by the petitioner or other party having the burden of going forward; five minutes is allotted for rebuttal unless more than 25 minutes has been used in the opening argument. A red light comes on when the time expires, and attorneys are to terminate their arguments immediately.

E. Post-argument Decision Conference [§ 27.26]

Following each day's oral arguments, the court meets in conference to discuss the cases argued that day. The chief justice presides at the conference, facilitates the court's discussion, and calls for the vote on the decision of each case.

For each case, the justice to whom the case was assigned for presentation at the post-argument conference, the reporting justice, gives his or her analysis and recommendation first, the court discusses the issues in the case, and the vote of each member of the court on the decision is taken, beginning with the reporting justice. When possible, the court reaches a decision, including the legal rationale on which the decision is to rest, in each of the cases argued that day, but any decision is tentative until the decision is mandated.

At this conference, the court may discuss those cases assigned for submission on briefs that present the same issue(s) as a case scheduled for oral argument that same day, or the court may delay decision and request the parties to comment on the effect of the case orally argued when that decision is mandated. The court discusses other cases assigned for submission on briefs on the date set by the chief justice. Following the court's tentative decision, any justice may request re-conferencing for further discussion of the case.

F. Assignment of Cases [§ 27.27]

Immediately after the court reaches its tentative decision in a case, whether at post-argument decision conference or at a succeeding conference, the case is assigned to a member of the court who is in the majority, on both the disposition and its legal rationale, to prepare the court's opinion. No case is assigned to a justice until after oral argument and after the court has reached its tentative decision.

Cases are assigned by lot: each justice is assigned a number from one to seven according to seniority, and the next senior justice, aside from the chief justice, draws one of seven numbered tokens. The number drawn for each case determines the justice to whom the writing of the opinion is assigned. Where possible, a case is assigned only to a justice who has voted with the majority and agrees with a majority on the legal rationale for the decision. In the event a justice to whom a case has been assigned subsequently decides to change his or her vote on the decision or the legal rationale of the case and ceases to be among the majority, he or she may withdraw from the assignment; the case is then reassigned by lot to a justice who is among the majority, and another case is assigned to the justice who has withdrawn.

The court attempts to assign an equal number of opinions to each justice during the term. Accordingly, where possible, a justice who votes with the majority is eligible to be assigned to write the opinion when that justice has been assigned fewer opinions than other justices in the majority unless each justice in the majority has been assigned the same number of opinions.

After the cases are assigned, the justice prepares a draft opinion for circulation to the court.

G. Opinion [§ 27.28]

1. First Circulation Dates for Majority Opinions [§ 27.29]

Majority opinions assigned in September, October and November shall be circulated no later than January 31. Majority opinions assigned in December and January shall be circulated no later than March 31. Majority opinions assigned in February shall be circulated no later than 60 days after assignment. Majority opinions assigned in March and April shall be circulated no later than May 31. Majority opinions assigned in May and separate opinions responding to opinions circulated in May shall be subject to a shortened timeline that will be circulated when it can be determined what deadlines are needed.

2. Majority Opinion Declarations [§ 27.30]

a. Initial Declarations [§ 27.31]

Within 10 days after the first circulation of a majority opinion, each participating justice shall declare by email to all justices participating in the case in one of three ways: (1) joins the opinion; (2) joins the opinion if specifically described changes are made; (3) does not join the opinion and may or will write separately.

b. Second Circulation of Majority Opinion [§ 27.32]

Within 21 days of receiving all initial declarations, the author of the majority opinion shall revise and recirculate the majority opinion, incorporating some or all of the changes specifically requested upon the initial circulation of the majority opinion or issue a statement that no changes will be made. A justice who asked for changes in the majority opinion that were not made and any other justice who does not join the majority opinion shall declare by email within 10 days of circulation of the second circulation of the

majority opinion that he or she joins the majority opinion or may be joining another justice's separate writing or will be writing separately.

3. Separate Writings [§ 27.33]

Whether concurring or dissenting, a justice who declares a separate writing in response to the first circulation of a majority opinion has 30 days after the justice's declaration to circulate his or her separate writing. A justice who declares a separate writing in response to a second circulation of the majority opinion shall circulate his or her separate writing within 21 days of the second circulation of the majority opinion or the statement that the majority opinion will not be revised further.

If upon circulation of separate writings, a justice who had not intended to write separately but had anticipated joining the writing of another justice decides to write, that justice shall discuss with the author of the majority opinion the date on which to circulate the separate writing. The author of the majority opinion shall advise the court of the date chosen for circulation of that separate writing.

4. Revisions to Majority Opinions/Separate Writings; Procedure for Mandating Opinions [§ 27.34]

Upon circulation of a separate opinion, the author of the majority opinion has 14 days in which to revise, and upon receipt of those revisions, dissents and concurrences have 14 days to respond to the majority's revision. Any further revisions/circulations of the majority opinion and or separate writings shall occur within 5 days of the writing to which the revision is responding.

The revision of dissents and concurrences shall not create new opinions, but shall respond only to revisions in the majority opinion.

Unless a justice decides to join a different opinion than previously declared, declarations upon recirculations of the majority opinion or recirculations of separate writings are not necessary until revisions of the majority opinion and separate writings are complete, at which time, each justice shall, within 5 days by email to all justices participating in the case, make a final declaration of which opinion he or she is joining.

If during this process the opinion originally circulated as the majority opinion does not garner the vote of a majority of the court, it shall be referred to in separate writings as the "lead opinion" unless a separate writing garners the vote of a majority of the court. If a separate writing garners the vote of a majority of the court, it shall be revised as the majority opinion within 14 days of the vote of the court. Within 7 days of the circulation of this majority opinion, the opinion initially circulated as the majority opinion and other separate writings shall be revised and indicate their status as concurrences or dissents to the new majority opinion.

Upon receipt of the final declarations of all participating justices, the majority author shall send an email summarizing the final declarations of all participating justices and that the opinion is approved for mandate. If the deadline for separate writings has passed and no separate writings have been circulated, the majority opinion author shall send an email to the participating justices indicating that no separate writings have been received and shall mandate the opinion.

Within 5 days of the mandate, the majority opinion shall be placed in the release drive; within 5 days after that event, the separate writings also shall be placed in the release drive for transmittal of all writings to the clerk's office for release to the public, unless release of separate writings is delayed as required by step 5 below.

5. Separate Writings to Follow [§ 27.35]

If, during the course of a separate writing, the author cites to a case then pending before the court for which the opinion of the court has not been released, the majority opinion shall be released with the designation "separate opinion(s) to follow," unless the citation can be replaced with ellipses in which case the separate opinion shall be released with the majority opinion and the ellipses shall be replaced with the omitted citation when the cited opinion is released. There shall be no further changes to the separate writings after mandate. Separate writings for which the citation cannot be replaced with ellipses shall be released when the then unreleased decision that was cited in the separate opinion is released.

6. Holds; Tying Together Release of Two Pending Cases [§ 27.36]

No one justice may block the release of a majority opinion by a "Hold." It shall take the affirmative vote of the majority of the participating justices to block the release of a majority opinion. No one justice may tie together the release of two pending cases. It shall take the affirmative vote of a majority of the participating justices in each case to tie together the release of two pending cases.

7. Court Conferences on Circulated Opinions [§ 27.37]

There will be no court conferences on circulated opinions unless the author of the majority opinion or at least a majority of justices participating in the case request court conference on the circulated opinion(s) in that case.

8. Next Business Day Deadline Extension [§ 27.38]

If a deadline set forth in these procedures falls on a state holiday, the deadline shall be on the next business day following the state holiday.

H. Per Curiam Opinion [§ 27.39]

Per curiam opinions may be prepared by a justice or a commissioner for consideration by the court. Per curiam opinions in judicial and attorney disciplinary proceedings are prepared by a commissioner for the court's consideration. The decisions in all cases are made by the court, and per curiam opinions are reviewed by the entire court and are approved as to form and substance by the court prior to issuance.

I. Mandate [§ 27.40]

The court's decision in a case is mandated promptly upon approval of the opinion by the court, as set forth above, and upon notification by the chief justice to the clerk. The court's opinion is issued simultaneously with any concurring or dissenting opinions, unless concurring or dissenting opinions come within paragraph [G.]5 above [*see supra* § 27.35] as "Separate Writing to Follow."

When a decision is ready to be mandated, the court's opinion, along with any concurring or dissenting opinions, is transmitted to the clerk's office where it is reviewed and assigned a public domain citation. The case name and number of opinions that are scheduled for release are ordinarily posted on the court's website two days prior to the scheduled release date. On the day of mandate, the clerk's office telephones the attorneys for the parties, notifying them of the court's decision, releases the opinion to the parties and makes copies of the opinion available for public inspection. The opinion is also posted to the court's website. The opinion remains subject to further editing and modification. The office of the clerk arranges for the publication of the final version of the opinion in official publications.

J. Reconsideration [§ 27.41]

The court does not reconsider its decision on petitions for review or petitions to bypass. Motions for reconsideration of the judgment or order of the court in other matters are assigned in rotation by the office of the clerk to a member of the court who participated in but did not author the court's opinion or write a dissent in the case. The justice reports on the motion and makes a recommendation. Every motion for reconsideration is decided by the court.

Reconsideration, in the sense of a rehearing of the case, is seldom granted. A change of decision on reconsideration will ensue only when the court has overlooked controlling legal precedent or important policy considerations or has overlooked or misconstrued a controlling or significant fact appearing in the record. A motion for reconsideration may result in the court's issuing a corrective or explanatory memorandum to its opinion without changing the original mandate.

The justice to whom a motion for reconsideration is assigned informs the office of the clerk of the court's decision on reconsideration, and the clerk issues an appropriate order. If reconsideration is granted and further briefing required, the case is placed with other pending cases and processed accordingly.

K. Remittitur [§ 27.42]

The clerk transmits to the Court of Appeals or to the circuit court, as appropriate, the mandate and opinion of the court together with the record in the case as follows: 31 days after the filing of the opinion of the court when no motion for reconsideration is filed; upon completion of reconsideration when reconsideration is granted; promptly upon the court's decision denying a motion for reconsideration.

L. Miscellaneous [§ 27.43]

1. Recusal or Disqualification of Justices [§ 27.44]

A justice may recuse himself or herself under any circumstances sufficient to require such action. The grounds for disqualification of a justice are set forth in Wis. Stat. § 757.19. The decision of a justice to recuse or disqualify himself or herself is that of the justice alone. When a justice recuses or disqualifies himself or herself, the justice takes no further part in the court's consideration of the matter. A justice who recuses himself or herself may file with the court or as part of a published opinion only the statement that: (a) the justice did not participate; or (b) the justice withdrew from participation. The court's orders and the opinion in the matter bear the notation that the justice did not participate or withdrew from consideration of the case.

2. Indigency [§ 27.45]

If a person seeking to proceed in the Supreme Court claims to be indigent, that claim generally will be accepted if an indigency determination as to that person previously has been made in the Supreme Court or in the Court of Appeals. If more than one year has elapsed since the indigency determination or if the subsequent case is of a substantially different type than the one in which the indigency determination was originally made, the clerk may request the person to submit a new affidavit of indigency form. If no indigency determination has been made previously, the clerk sends the person an affidavit of indigency to be completed and returned. The affidavit is accompanied by a form order requiring completion and filing of the affidavit within 10 days of the date of the order or, failing which, ordering the dismissal of the proceedings.

The clerk makes indigency determinations. If the person is determined to be indigent, the clerk issues an order waiving payment of the filing fee in the proceeding. If the affidavit of indigency is incomplete or is not credible, the clerk issues an order stating that the affidavit is incomplete or the reasons for which the affidavit is deemed not credible, stating that the affidavit is not approved and requiring the person either to pay the appropriate filing fee or submit a credible and completed affidavit within five days of the date of the order, failing which the proceedings will be dismissed.

If the clerk determines on the basis of a complete and credible affidavit that a person is not indigent, the clerk issues an order directing the person to pay the appropriate filing fee in the proceedings. If the person does not respond to a court order concerning indigency, the clerk assigns the matter to a commissioner for review; the commissioner reports to the court with recommendations.

3. Statistics [§ 27.46]

The clerk prepares a monthly statistical report setting forth the status of matters pending with the court and a cumulative accounting of matters disposed by the court from the preceding September. The clerk distributes a copy of these statistical reports to the court and to the director of state courts.

4. Voluntary Dismissal [§ 27.47]

If a notice of voluntary dismissal of a proceeding on a petition for review, petition for bypass or certification or of an original action or supervisory writ proceeding is filed before all of the briefs in the proceeding are filed, the chief justice may act on the notice; if a notice of voluntary dismissal is filed after all of the briefs in the proceeding are filed, the chief justice shall bring the notice to the court for action.

V. Rule-Making Process [§ 27.48]

A. Public Hearing [§ 27.49]

The court notices and holds a public hearing on petitions for the creation or amendment of rules governing pleading, practice and procedure in judicial proceedings in all courts, provided that the court deems the petition to have arguable merit. In the event the court deems a petition meritless, it may, without holding a public hearing, summarily dismiss the petition or decline to take any action. *See* Wis. Stat. § 751.12. The court also holds a public hearing on petitions for amendment of the Supreme Court Rules except, in the court's discretion, when the petition concerns ministerial or otherwise nonsubstantive matters or when exigent circumstances exist.

B. Closed Conference [§ 27.50]

After a public hearing is held the court meets in closed conference to discuss the merits of and act on the rules petition. All matters within the court's rule-making jurisdiction are assigned to a commissioner for analysis and reporting to the court. [*See supra* § 27.22.] The commissioner prepares and circulates material to the court for its assistance at the conference, participates in the conference at the court's discretion, and drafts rules and prepares orders at the court's direction.

VI. Appointment Process [§ 27.51]

The Wisconsin Supreme Court, pursuant to statutory authority and the court's rules, regularly appoints lawyers and non-lawyer members of the public to various boards, committees, and other entities. In making those appointments, the court's objective is to maximize the participation of lawyers and the public in the work of those entities. The court has created the Appointment Selection Committee (ASC) independent of the court to assist in the process. The ASC solicits and evaluates persons for appointment and nominates for the court's consideration the persons it determines are best qualified to serve. In evaluating the qualifications of persons interested in appointment, the ASC applies the criteria established by the court for each of the entities to which appointment is made.

In making appointments, the court's objective is to provide quality and promote diversity on the boards, committees and other entities. The appointment procedure established by the court is designed to produce appointments based solely on the qualities of integrity, intelligence, experience and commitment.

A. Appointment Selection Committee [§ 27.52]

The ASC consists of the following 12 persons:

One attorney from the Milwaukee metropolitan area selected by the dean of the Marquette University Law School.

One attorney from outside the Milwaukee metropolitan area selected by the dean of the University of Wisconsin Law School.

The president of a county bar association located within the Eastern District of Wisconsin chosen by the court by lot, or his or her designee.

The president of a county bar association located within the Western District of Wisconsin chosen by the court by lot, or his or her designee.

The chair of the Family Law Section of the State Bar of Wisconsin, or his or her designee.

The chair of the [Solo/Small Firm &] General Practice Section of the State Bar of Wisconsin, or his or her designee.

The president of the Government Lawyers Division of the State Bar of Wisconsin, or his or her designee.

One former member of the Board of Attorneys Professional Responsibility [the Office of Lawyer Regulation (OLR)] or the Board of Bar Examiners who has not served within the preceding five years, chosen by the court by lot.

The chair of one of the district professional responsibility committees provided in SCR 21.08, chosen by the court by lot.

One non-lawyer member of the public designated by the Senate Co-Chair of the Legislative Council.

One non-lawyer member of the public designated by the Assembly Co-Chair of the Legislative Council.

One non-lawyer member of the public designated by the chair of the State Ethics Board [Wisconsin Ethics Commission].

To be eligible to serve on the ASC, a lawyer must have practiced law for more than five years.

The term of a member is three years.

Vacancies on the ASC are filled by the persons identified above, respectively. When the person is specified to be chosen by lot, a person is chosen by lot each time there is a vacancy in that position.

The ASC selects its chair at the first meeting of each calendar year. Staff support is provided to the ASC.

B. Meetings [§ 27.53]

The ASC meets at such times as considered necessary by its chair. The meetings are held at locations and times so as to enable the greatest number of members to participate.

C. Nomination Procedure [§ 27.54]

1. Notice of Vacancy [§ 27.55]

Each board, committee and other entity to which the Supreme Court makes appointment of lawyers and non-lawyer members of the public notifies the clerk of the court as soon as practicable of appointments that need to be made. The clerk of the court notifies the ASC chair of those appointments.

2. Information to and Solicitation of Interested Persons [§ 27.56]

In addition to the information disseminated by the court regarding the appointment of lawyers and non-lawyer members of the public, the ASC publicizes the appointments to be made by such means as, in the ASC's discretion, will provide notice to the greatest number of persons likely to be interested in being appointed. To the extent it deems necessary, the ASC may conduct in-person information and solicitation sessions to produce qualified persons interested in being appointed.

3. Resumes; Interviews [§ 27.57]

The ASC invites persons interested in being appointed to submit a written resume of their qualifications. The ASC may personally interview those persons whose resumes demonstrate qualifications that appear to warrant a personal, confidential interview before the full ASC or any number of its members the ASC may designate.

4. Nomination [§ 27.58]

Not less than 30 days prior to the expiration of a term or other applicable date that requires an appointment by the Supreme Court, the ASC submits to the Supreme Court the names of persons it nominates for appointment. Each attorney nominated shall be vetted by OLR, and each public member nominated shall be vetted through relevant sources. If more than one position on a particular board, committee or other entity is to be filled by appointment at the same time, the ASC, in its discretion, may submit the

number of names it considers appropriate for appointment to the positions generally or in respect to each position separately. Together with the nominations, the ASC submits to the court all of the resumes and other material it has collected to consider regarding nominations. The court also may ask the ASC to submit additional nominations.

5. Reappointment [§ 27.59]

When a member of a board, committee or other entity is eligible for reappointment to a successive term, the ASC ascertains whether the member regularly attended meetings of the board, committee or other entity, made significant contribution to its work, and is willing to accept reappointment. If the member's participation has been satisfactory and the member is willing to accept reappointment, and the ASC nominates the member for reappointment to a successive term, it is unnecessary for the ASC to nominate other persons for appointment to the position. If the member's participation has been unsatisfactory or the member is not willing to accept reappointment, the ASC proceeds as in the case of an appointment.

6. Criteria [§ 27.60]

In determining the qualifications of persons for appointment, the ASC applies the criteria for the specific position established by the court from time to time and provided to the ASC in writing. The ASC may, with the approval of the court, apply additional specific criteria.

D. Reimbursement [§ 27.61]

Members of the ASC are reimbursed for travel, lodging and related expenses reasonably incurred in carrying out their duties.

VII. Court of Appeals Chief Judge Term Limit [§ 27.62]

The chief judge of the court of appeals, appointed under Wis. Stat. § 752.07, is subject to removal by the supreme court and may not serve more than 2 consecutive terms. In exceptional circumstances the supreme court, in its discretion, may extend the chief judge's service beyond the 2 term limit.

Supplement Chapter 28
Administrative Appeals

Book sections supplemented: 28.1, 28.4, 28.5, 28.7, 28.8, 28.16, and 28.27

28.1 Scope

Page 2: Amended currency information in footnote 1

[1] Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023.

28.4 [General Concepts of Administrative Review] Exhaustion of Administrative Remedies

Pages 4–5: Amended case name in last two textual sentences in section

In the court's discretionary determination whether to dismiss an action because of a failure to exhaust administrative remedies, the circuit court must balance the litigant's need for judicial review, the administrative agency's interest in precluding premature review, and the public's interest in the efficient administration of justice. *Trager*, 118 Wis. 2d at 214. The merits of the action are a significant consideration in the court's decision on whether to invoke the exhaustion doctrine. *Id*. at 216. The courts are reluctant to invoke the doctrine if it will produce harsh consequences, unless the interests underlying the rule clearly outweigh the need for immediate judicial review. *Id*. See, however, *Kuechmann v. School District of La Crosse*, 170 Wis. 2d 218, 224, 487 N.W.2d 639 (Ct. App. 1992), in which the court of appeals held that the circuit court has no jurisdiction to hear an original action when the parties have not exhausted their administrative review procedure. The *Kuechmann* court also took the position that the administrative board's inability to act on or review a claim is not a basis for not following the review procedure mandated by statute, even if the board says it will not review a certain claim, because a proper record for appeal should be developed in the agency before going to the courts for judicial review. *Id.* at 225.

28.5 [General Concepts of Administrative Review] Primary Jurisdiction

Page 6: Replaced first paragraph in section

A concept similar to exhaustion is the doctrine of primary jurisdiction. This is sometimes referred to as a negative standard of review. *See infra* app. C. In contrast to the doctrine of exhaustion, the doctrine of primary jurisdiction applies when formal agency proceedings have *not* been instituted. In such cases, the circuit court may, in the exercise of its discretion, decline to consider a matter on the ground that the agency is better suited to decide the case. *See, e.g*., *Beal v. First Fed. Sav. & Loan Ass'n*, 90 Wis. 2d 171, 197–98, 279 N.W.2d 693 (1979). Such a result is likely if the case involves fact-finding or policy issues within the special expertise of the agency. *Id*. In cases presenting pure questions of law, however, it is appropriate that the matter be decided by the circuit court. *Wisconsin Prop. Tax Consultants, Inc. v. Wisconsin Dep't of Revenue*, 2022 WI 51, ¶¶ 3–15, 402 Wis. 2d 653, 976 N.W.2d 482. The primary-jurisdiction rule serves to promote comity between the agencies and the courts; it also promotes the interests of judicial administration. *Beal*, 90 Wis. 2d at 197–98. But if a matter involves significant issues of law or statutory interpretation and not specialized questions of fact, the circuit court has less reason to defer to the agency. *See Wisconsin Prop. Tax Consultants*, 2022 WI 51, ¶¶ 6–7, 402 Wis. 2d 653.

28.7 Decisions Reviewable Under Wis. Stat. ch. 227

Page 7: Added Friends of Black River Forest *citation to end of second paragraph in section*

Wis. Stat. § 227.52 generally provides that administrative decisions that adversely affect the substantial interests of any person, by action or inaction, whether affirmative or negative in form, are subject to review under Wis. Stat. ch. 227. Wis. Stat. § 227.52 also contains certain exceptions, however, and does not apply if otherwise provided by law. The decisions eligible for review under Wis. Stat. § 227.52 are final decisions that further satisfy the requirements of Wis. Stat. § 227.47: they must follow a hearing, be in writing, be supported by a record, and be based on findings of fact and conclusions of law. *See Wisconsin's Env't Decade v. Public Serv. Comm'n*, 93 Wis. 2d 650, 659a, 287 N.W.2d 737 (1980). The court has no jurisdiction to review matters falling outside this definition of *decision*. *Id*. at 657. As summarized by one opinion, review may be had under Wis. Stat. ch. 227 if (1) there is a final decision, (2) the decision is made in writing accompanied by findings of fact and conclusions of law, (3) the decision adversely affects a substantial interest of any person, and (4) review is sought by such an aggrieved person. *See Madison Landfills, Inc. v. Wisconsin Dep't of Nat. Res.*, 180 Wis. 2d 129, 138, 509 N.W.2d 300 (Ct. App. 1993); *see also Friends of Black River Forest v. Wisconsin Dep't of Nat. Res.*, 2021 WI App 54, ¶ 9, 404 Wis. 2d 590, 964 N.W.2d 342 (stating that "[a] final decision determines 'the substantial rights of the parties involved' and concludes the agency proceeding"; neither the decision's form nor its label necessarily determine finality).

Page 8: Added textual sentence and Container Life Cycle Mgmt. *citation to end of second-to-last paragraph in section*

Some confusion surrounds the requirement that the administrative decision be final. Because the legislative intent behind Wis. Stat. § 227.52 was to limit review to final agency orders, review is ordinarily available only of decisions that terminate administrative proceedings. Nonetheless, the courts have indicated that the power of judicial review is not limited by a literal reading of Wis. Stat. § 227.52 (formerly Wis. Stat. § 227.15). *Friends of the Earth v. Public Serv. Comm'n*, 78 Wis. 2d 388, 404–05, 254 N.W.2d 299 (1977). The test of whether nonfinal orders may be reviewed turns on the need for judicial review to protect against irreparable injury threatened in exceptional cases by administrative rulings that attach legal consequences to actions taken in

advance of other hearings and adjudications that may follow. *Id*. Another case states that although finality is a consideration, the determinative issue is whether review is necessary because the administrative action adversely affects the substantial interests of the person seeking review. *Container Life Cycle Mgmt., LLC v. Wisconsin Dep't of Nat. Res.*, 2022 WI 45, ¶¶ 35–36, 402 Wis. 2d 337, 975 N.W.2d 621.

28.8 Standing to Obtain Judicial Review Under Wis. Stat. ch. 227

Pages 8–9: Added Friends of Black River Forest *citation to end of second paragraph in section*

A person is aggrieved by an agency decision if the decision directly injures the person's legally recognized interests. *City of Appleton v. Transportation Comm'n*, 116 Wis. 2d 352, 356, 342 N.W.2d 68 (Ct. App. 1983). Thus, two issues are involved in determining standing: (1) whether the decision directly causes injury to the petitioner's interest, and (2) whether the asserted interest is recognized by law. *Fox v. Wisconsin Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983); *Kammes v. Mining Inv. & Loc. Impact Fund Bd.*, 115 Wis. 2d 144, 151, 340 N.W.2d 206 (Ct. App. 1983); *see also Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 32, 46–47, 402 Wis. 2d 587, 977 N.W.2d 342.

28.16 [Judicial Review Under Wis. Stat. ch. 227] Record on Review

Page 15: Added citation to end of last paragraph in section

The court rarely grants motions to present additional evidence. If the court does grant leave, however, it remands the matter to the agency, which takes the testimony and may then modify its findings and decision as appropriate. *Id*. The record is then returned to the reviewing court, supplemented with the additional testimony and new findings and decision, if any. *Id*. The only type of additional testimony that would be taken in the circuit court, instead of before the agency on remand, is testimony about claimed irregularities in the procedure before the agency. Wis. Stat. § 227.57(1); *see also County of Dane v. Public Serv. Comm'n of Wis.*, 2022 WI 61, ¶¶ 30, 38–39, 58, 403 Wis. 2d 306, 976 N.W.2d 790 (holding that claimant alleging irregularities in agency's procedure must show serious risk of actual bias on part of agency decision-maker to meet burden of "proper cause" for expansion of record in circuit court under Wis. Stat. § 227.57(1)).

28.27 Certiorari

Page 25: Amended Wis. Stat. citation after second textual sentence in section

There are two general categories of certiorari: statutory and common law. Statutory certiorari applies when a statute provides that review is by certiorari. *See, e.g.*, Wis. Stat. §§ 70.47(13) (appeal from property tax board of review), 781.10(2)(a) (review of a final decision of a political subdivision concerning residential development). A statute that provides for review but does not specify certiorari does not preclude application of certiorari principles in that review. *See Nowell v. City of Wausau*, 2013 WI 88, ¶¶ 23, 33, 48, 351 Wis. 2d 1, 838 N.W.2d 852 (holding that statute's context warranted certiorari rather than de novo review). Common-law certiorari is available as a remedy whenever there is no express statutory method of review. *See, e.g.*, *State ex rel. Palleon v. Musolf*, 117 Wis. 2d 469, 473 n.4, 345 N.W.2d 73 (Ct. App.) (stating that certiorari was proper because Department of Revenue order expressly exempt from review under former Wis. Stat. § 227.15 (now Wis. Stat. § 227.52)), *aff'd*, 120 Wis. 2d 545, 356 N.W.2d 487 (1984); *Coleman v. Percy*, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980) ("[W]e have consistently stated that the … refusal to grant [discretionary] parole may be reviewed by common law certiorari.").

Page 27: Added paragraph before first paragraph before Comment *in section*

If a statute allowing review by certiorari specifies that review may be sought by certain entities, other entities may be barred from seeking review. *See State ex rel. City of Waukesha v. City of Waukesha Bd. of Rev.*, 2021 WI 89, ¶¶ 38–39, 399 Wis. 2d 696, 967 N.W.2d 460 (holding that only taxpayer, not city of Waukesha, was allowed to seek review under Wis. Stat. § 70.47(13) (2017–18)).

Page 28: Amended parenthetical after last citation in first paragraph after Comment *in section*

Even in cases in which a specific statute sets forth the time for review, the event triggering that time may be an issue. *See Pulera v. Town of Richmond*, 2017 WI 61, 375 Wis. 2d 676, 896 N.W.2d 342. The statute in question in *Pulera*—Wis. Stat. § 68.13(1)—governs appeals from many types of municipal administrative decisions and provides for certiorari review within 30 days after receipt of the "final determination." Rejecting the position that the triggering event was the vote by the town board approving proposed highway modifications, the supreme court's lead opinion held that the final determination was the recording of a highway order by the register of deeds, concluding that this event gives public notice to potentially aggrieved parties. *Pulera*, 2017 WI 61, ¶¶ 22–29, 375 Wis. 2d 676. As noted in the concurring and dissenting opinions, however, this solution left open what will constitute a "final determination" when a municipal administrative body rejects the proposed actions or modifications and issues no order for the register of deeds to record. *Id.* ¶ 51 (Bradley, R.G., J., concurring); *id.* ¶ 64 (Bradley, A.W., J., dissenting); *see also Moreschi v. Village of Williams Bay*, 2020 WI 95, ¶¶ 19–24, 395 Wis. 2d 55, 953 N.W.2d 318 (concluding that triggering event for review of zoning board of appeals "decision" under Wis. Stat. § 62.23(7)(e)10. (renumbered as Wis. Stat. § 62.23(7)(e)10.a. by 2023 Wis. Act 16) is board's filing of a "determination form," not the filing of the minutes).

Chapter 28
Administrative Appeals

I. Scope
[§ 28.1]

Administrative law continues to be a growing and, despite efforts at simplification, complex area of law. Although the focus of this book is on appellate review under Wis. Stat. ch. 809, a summary of the main points of administrative appeals is warranted if only because review of administrative decisions constitutes a significant part of the appellate courts' workload.[1]

This chapter emphasizes judicial review of administrative decisions under the Wisconsin Administrative Procedure Act, Wis. Stat. ch. 227. The major alternative review procedures, such as those for worker's compensation decisions, are also outlined. This chapter does not consider judicial review of agency rules. For a discussion of that subject, see Steve Levine, *How to Review an Administrative Rule*, Wis. Bar Bull., Oct. 1983, at 40; *see also Wisconsin Ass'n of State Prosecutors v. Wisconsin Emp. Rels. Comm'n*, 2018 WI 17, ¶¶ 36–39, 380 Wis. 2d 1, 907 N.W.2d 425. This chapter also does not discuss when an agency must enact a new rule rather than effecting a de facto rule in the context of a contested case. *See Lamar Cent. Outdoor, LLC v. Division of Hearings & Appeals*, 2019 WI 109, ¶¶ 17–23, 389 Wis. 2d 486, 936 N.W.2d 573 (discussing Wis. Stat. § 227.10(1)).

Summarizing administrative appeals is difficult because, notwithstanding legislative reform efforts, administrative law is fraught with exceptions to general rules, and it is difficult to draw a bright line between general administrative procedure and administrative appeal procedure. For these reasons, this chapter does not purport to exhaustively consider every aspect of administrative appeals.

The chapter begins with a brief treatment of the general concepts of administrative review. These include the exclusivity of statutory remedies, the exhaustion of administrative remedies, and the requirement of strict compliance with the statutes. Next, the chapter discusses judicial review under Wis. Stat. ch. 227: which decisions may be reviewed; standing, how to obtain review, the scope of review, temporary relief, and appeals to the court of appeals and the supreme court. The chapter concludes with a discussion of two significant exceptions to the uniform procedures under Wis. Stat. ch. 227: review in worker's compensation and unemployment insurance cases, and review by certiorari.

II. General Concepts of Administrative Review [§ 28.2]

A. Exclusivity of Statutory Remedies [§ 28.3]

A basic concept of law often invoked in administrative proceedings is that, when a method of review is prescribed by statute, that method of review is exclusive. *See, e.g.*, *State ex rel. First Nat'l Bank v. M&I Peoples Bank*, 82 Wis. 2d 529, 542, 263 N.W.2d 196 (1978). Although this is a rule of policy and judicial convenience and discretion, as opposed to power or jurisdiction, the statutory method will be found exclusive if it is plain, speedy, and adequate. *Id*. The supreme court in *First National Bank* affirmed an order

dismissing a complaint in quo warranto and held that, because every issue raised was susceptible to a remedy under Wis. Stat. ch. 227, the action should have been brought under that chapter. The court refused to carve out an exception to the exclusivity of Wis. Stat. ch. 227 for cases that raise constitutional or jurisdictional issues. *Id*. at 544.

Consistent with the exclusivity doctrine is the doctrine that when Wis. Stat. ch. 227 applies, its application is complete. Wis. Stat. ch. 227 provides a comprehensive, fully defined procedure for judicial review of administrative decisions. The procedures applicable to ordinary civil actions do not apply in a Wis. Stat. ch. 227 proceeding unless so provided by law. *See, e.g.*, *Wisconsin's Env't Decade, Inc. v. Public Serv. Comm'n*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977); *see also Charter Mfg. Co. v. Milwaukee River Restoration Council, Inc*., 102 Wis. 2d 521, 525, 307 N.W.2d 322 (Ct. App. 1981).

B. Exhaustion of Administrative Remedies [§ 28.4]

Another well-recognized judicial policy in administrative law requires parties to exhaust their administrative remedies before seeking judicial review of an administrative agency action. *See, e.g.*, *State ex rel. First Nat'l Bank v. M&I Peoples Bank*, 82 Wis. 2d 529, 544–45, 263 N.W.2d 196 (1978). The doctrine of exhaustion of remedies applies only when an administrative proceeding has been instituted. *Sawejka v. Morgan*, 56 Wis. 2d 70, 79, 201 N.W.2d 528 (1972). As with the exclusivity doctrine, the doctrine of exhaustion of remedies is one of policy and judicial convenience and discretion, not one of jurisdiction. *County of Sauk v. Trager*, 118 Wis. 2d 204, 211–12, 346 N.W.2d 756 (1984). *But see Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶¶ 16–17, 305 Wis. 2d 788, 741 N.W.2d 244 (suggesting that review of application of the exhaustion doctrine is de novo rather than deferential to a discretionary circuit court determination). In some cases, exhaustion of remedies may be required by statute. *See, e.g.*, Wis. Stat. § 108.09(7)(a) (review of unemployment insurance claims).

The exhaustion rule is premised on the assumptions that the administrative remedy (1) is available to the party on the party's initiative, (2) is relatively rapid, and (3) will protect the party's claim of right. *See Nodell Inv. Corp. v. City of Glendale*, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977).

In the court's discretionary determination whether to dismiss an action because of a failure to exhaust administrative remedies, the circuit court must balance the litigant's need for judicial review, the administrative agency's interest in precluding premature review, and the public's interest in the efficient administration of justice. *Trager*, 118 Wis. 2d at 214. The merits of the action are a significant consideration in the court's decision on whether to invoke the exhaustion doctrine. *Id*. at 216. The courts are reluctant to invoke the doctrine if it will produce harsh consequences, unless the interests underlying the rule clearly outweigh the need for immediate judicial review. *Id*. See, however, *Keuchmann v. La Crosse School District*, 170 Wis. 2d 218, 224, 487 N.W.2d 639 (Ct. App. 1992), in which the court of appeals held that the circuit court has no jurisdiction to hear an original action when the parties have not exhausted their administrative review procedure. The *Keuchmann* court also took the position that the administrative board's inability to act on or review a claim is not a basis for not following the review procedure mandated by statute, even if the board says it will not review a certain claim, because a proper record for appeal should be developed in the agency before going to the courts for judicial review. *Id.* at 225.

Consistent with the duty to exhaust administrative remedies, parties must raise specific issues in the administrative hearing as a prerequisite to judicial review. *Bunker v. LIRC*, 2002 WI App 216, ¶ 15, 257 Wis. 2d 255, 650 N.W.2d 864. The fact that a party was self-represented before the agency does not create an exception to this waiver rule. *Id*. ¶ 24.

In determining whether to invoke the exhaustion doctrine, the courts have identified six categories in which failure to exhaust administrative remedies may be excused:

5. The agency has no jurisdiction to act in the matter.

6. The administrative action is fatally void.

7. The matter involves a question of law, with respect to which the administrative agency's expertise is not important.

8. The matter involves a substantial constitutional question.

9. The administrative remedy is inadequate to avoid irreparable harm.

10. Recourse to the administrative agency would be a futile or useless act.

Nodell Inv. Corp., 78 Wis. 2d at 425 n.12.

In certain cases, failure of the agency to advise the parties of the right to administrative review may estop the agency from invoking the exhaustion rule to preclude judicial review. *State ex rel. L'Minggio v. Gamble*, 2003 WI 82, ¶ 15, 263 Wis. 2d 55, 667 N.W.2d 1.

Although the exhaustion doctrine is more flexible than the exclusivity doctrine, parties should always look first for administrative remedies and exhaust them before seeking judicial review.

C. Primary Jurisdiction [§ 28.5]

A concept similar to exhaustion is the doctrine of primary jurisdiction. This is sometimes referred to as a negative standard of review. *See infra* app. C. In contrast to the doctrine of exhaustion, the doctrine of primary jurisdiction applies when formal agency proceedings have *not* been instituted. In such cases, the circuit court may, in the exercise of its discretion, decline to consider a matter on the ground that the agency is better suited to decide the case. *See, e.g*., *Beal v. First Fed. Sav. & Loan Ass'n*, 90 Wis. 2d 171, 197–98, 279 N.W.2d 693 (1979). Such a result is likely if the case involves fact-finding or policy issues within the special expertise of the agency. *Id*. The primary-jurisdiction rule serves to promote comity between the agencies and the courts; it also promotes the interests of judicial administration. *Id*.

The doctrines of exclusivity, exhaustion, and primary jurisdiction overlap to a certain degree. For example, if a party first seeks administrative relief in a situation in which there is concurrent jurisdiction, the party could not then seek relief in court without exhausting all administrative remedies. A primary-jurisdiction option contemplates that no administrative review is underway. *Sawejka v. Morgan*, 56 Wis. 2d 70, 79, 201 N.W.2d 528. The primary-jurisdiction doctrine is also subject to limitation by the doctrine of exclusivity of remedies.

D. Strict Compliance with Procedural Statutes [§ 28.6]

A final concept regarding administrative appeals that must be emphasized is the requirement of strict compliance with procedural statutes. *See, e.g.*, *Trojan v. Board of Regents*, 104 Wis. 2d 277, 283–84, 311 N.W.2d 586 (1981). Lack of strict compliance results in failure to obtain subject-matter jurisdiction. *Id*. However, in recognition of the legitimate confusion often attending administrative statutes, the courts have attempted to temper this rule when possible. Thus, courts have held that not every statutory defect deprives the court of competency; only those "central to the statutory scheme" do so. *DWD v. LIRC*, 2016 WI App 21, ¶ 9, 367 Wis. 2d 609, 877 N.W.2d 620; *see also id.* ¶10. In addition, the rule requiring strict compliance with procedural statutes only applies when the statutes clearly set forth the procedural requirements necessary to pursue such review. *State ex rel. Grzelak v. Bertrand*, 2003 WI 102, ¶ 23, 263 Wis. 2d 678, 665 N.W.2d 244. If a statute is ambiguous, it must be liberally construed to permit a determination on the merits, if such a construction is possible. *Id*. Notwithstanding the possibility of such lenience, the importance of following the provisions of Wis. Stat. ch. 227 to the letter cannot be overemphasized.

III. Decisions Reviewable Under Wis. Stat. ch. 227 [§ 28.7]

The bulk of administrative decisions are reviewable under Wis. Stat. ch. 227. The remainder are divided among matters that have a special statutory review procedure, such as worker's compensation and unemployment insurance cases, *see infra* § 28.26, and matters that are reviewed by either statutory or common-law certiorari, *see infra* § 28.27. *See also* Wis. Stat. § 227.03 (applicability of Wis. Stat. ch. 227).

Wis. Stat. § 227.52 generally provides that administrative decisions that adversely affect the substantial interests of any person, by action or inaction, whether affirmative or negative in form, are subject to review under Wis. Stat. ch. 227. Wis. Stat. § 227.52

also contains certain exceptions, however, and does not apply if otherwise provided by law. The decisions eligible for review under Wis. Stat. § 227.52 are final decisions that further satisfy the requirements of Wis. Stat. § 227.47: they must follow a hearing, be in writing, be supported by a record, and be based on findings of fact and conclusions of law. *See Wisconsin's Envtl. Decade v. Public Serv. Comm'n*, 93 Wis. 2d 650, 659a, 287 N.W.2d 737 (1980). The court has no jurisdiction to review matters falling outside this definition of *decision*. *Id*. at 657. As summarized by one opinion, review may be had under Wis. Stat. ch. 227 if (1) there is a final decision, (2) the decision is made in writing accompanied by findings of fact and conclusions of law, (3) the decision adversely affects a substantial interest of any person, and (4) review is sought by such an aggrieved person. *See Madison Landfills, Inc. v. DNR*, 180 Wis. 2d 129, 138, 509 N.W.2d 300 (Ct. App. 1993).

Administrative orders directing an agency to take action, but allowing the agency to exercise discretion in doing so, are nonfinal orders and not reviewable. *Sierra Club v. DNR*, 2007 WI App 181, ¶ 1, 304 Wis. 2d 614, 736 N.W.2d 918. All nonfinal rulings and orders in administrative proceedings may be reviewed on appeal from a subsequent, final order terminating the entire administrative proceeding. *Id*. ¶ 27.

Some confusion surrounds the requirement that the administrative decision be final. Because the legislative intent behind Wis. Stat. § 227.52 was to limit review to final agency orders, review is ordinarily available only of decisions that terminate administrative proceedings. Nonetheless, the courts have indicated that the power of judicial review is not limited by a literal reading of Wis. Stat. § 227.52 (formerly Wis. Stat. § 227.15). *Friends of the Earth v. Public Serv. Comm'n*, 78 Wis. 2d 388, 404–05, 254 N.W.2d 299 (1977). The test of whether nonfinal orders may be reviewed turns on the need for judicial review to protect against irreparable injury threatened in exceptional cases by administrative rulings that attach legal consequences to actions taken in advance of other hearings and adjudications that may follow. *Id*.

In *Friends of the Earth*, the court refused to find that an interim rate order by the Public Service Commission gave rise to irreparable harm warranting judicial review. *Id*. at 409–10. Attorneys would do well to heed the admonition that nonfinal agency orders are reviewable only in exceptional cases.

IV. Standing to Obtain Judicial Review Under Wis. Stat. ch. 227

[§ 28.8]

Standing to challenge an administrative decision is a recurring issue in the case law. *See generally* Ramon A. Klitzke, *Administrative Decisions Eligible for Judicial Review in Wisconsin*, 61 Marq. L. Rev. 405, 416–21 (1978). Pursuant to Wis. Stat. § 227.52, judicial review may be had of decisions that "adversely affect the substantial interests of any person." Wis. Stat. ch. 227 further provides that a person "aggrieved" by a decision may seek judicial review, *see* Wis. Stat. § 227.53(1), and that a respondent may move to dismiss a petition for judicial review on the ground that it does not show the petitioner to be a "person aggrieved by the decision," *see* Wis. Stat. § 227.56(3). The court must allow a petitioner under Wis. Stat. § 227.53 an opportunity to amend the petition before the court can dismiss it for lack of standing. *See Jackson v. LIRC*, 2006 WI App 97, ¶ 19, 293 Wis. 2d 332, 715 N.W.2d 654.

A person is aggrieved by an agency decision if the decision directly injures the person's legally recognized interests. *City of Appleton v. Transportation Comm'n*, 116 Wis. 2d 352, 356, 342 N.W.2d 68 (Ct. App. 1983). Thus, two issues are involved in determining standing: (1) whether the decision directly causes injury to the petitioner's interest, and (2) whether the asserted interest is recognized by law. *Fox v. Department of Health & Soc. Servs.*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983); *Kammes v. Mining Inv. & Local Impact Fund Bd.*, 115 Wis. 2d 144, 151, 340 N.W.2d 206 (Ct. App. 1983).

Standing is crucial to judicial review under Wis. Stat. ch. 227 because it is necessary for subject-matter jurisdiction. *See Fox*, 112 Wis. 2d at 538. However, the courts have held that the law of standing is not to be applied narrowly or restrictively in the context of administrative appeals. *Id*. at 524; *Kammes*, 115 Wis. 2d at 151. One need not be a party to the administrative proceedings to have standing to seek judicial review of the administrative decision. *Kammes*, 115 Wis. 2d at 151.

Injury appears to be the most important element in standing under Wis. Stat. § 227.52. When an actual injury is demonstrated, even a "trifling" interest may be sufficient to confer standing. *Fox*, 112 Wis. 2d at 524. The injury need not be physical or economic; courts have recognized an injury to aesthetic, conservational, or recreational interests as sufficient to confer standing. *Id*. at 525. Petitioners must show, however, that they have sustained or are in immediate danger of sustaining some direct injury. Abstract injury

is not enough. It must be real and immediate, not conjectural or hypothetical. *Id. But see City Mayville v. Department of Admin.*, 2021 WI 57, ¶ 18, 397 Wis. 2d 496, 960 N.W.2d 416 (stating that even a minor injury may be sufficient to confer standing).

V. Commencing Judicial Review Under Wis. Stat. ch. 227 [§ 28.9]

A. In General [§ 28.10]

Judicial review of decisions specified in Wis. Stat. § 227.52 is commenced under Wis. Stat. § 227.53, unless otherwise provided by law. The review proceedings are instituted by a petition, which must be filed with the clerk of circuit court for the county in which judicial review will occur and served on the agency personally or by certified mail within 30 days after service of the agency's decision. Wis. Stat. § 227.53(1)(a). Filing occurs when the petition is received by the clerk of circuit court. *See Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis. 2d 813, 822, 284 N.W.2d 93 (1979); *Hamilton v. DILHR*, 56 Wis. 2d 673, 684–85, 203 N.W.2d 7 (1973). The 30-day period for seeking judicial review applies in both contested and noncontested cases. Wis. Stat. § 227.53(1)(a)2., 2m.

If a rehearing by the agency has been requested pursuant to Wis. Stat. § 227.49, the petition for judicial review of a contested case must be filed and served within 30 days after service of the agency's order disposing of the application for rehearing. Wis. Stat. § 227.53(1)(a)2. If the agency fails to act on the petition for rehearing within 30 days, the petition is deemed denied under Wis. Stat. § 227.49(5) and the petition for judicial review must be filed and served within 30 days after the deemed denial. *Id*. Petitions for review of noncontested cases must be served and filed within 30 days after personal service or mailing of the agency's decision. Wis. Stat. § 227.53(1)(a)2m.

In keeping with the requirement of strict compliance with procedural statutes, *see supra* § 28.6, it is essential that attorneys carefully follow the steps outlined in Wis. Stat. § 227.53 for commencing an administrative appeal. This means not only satisfying the provisions governing the contents of the petition, but also filing and serving the petition within the prescribed 30-day period, filing it in the proper county, and serving it on the proper agency in the proper fashion. Failure to file a petition for rehearing in the underlying administrative proceeding in proper fashion may also cause a party to forfeit the right to judicial review. *See Currier v. Wisconsin Dep't of Revenue*, 2006 WI App 12, ¶ 23, 288 Wis. 2d 693, 709 N.W.2d 520.

B. Venue [§ 28.11]

If the petitioner is a resident of Wisconsin, judicial review must be in the circuit court in the county where the petitioner resides, unless the petitioner is an agency, in which case the proceedings must be in the county where the respondent resides. Wis. Stat. § 227.53(1)(a)3. If the petitioner is a nonresident of Wisconsin, the proceedings are instituted in the county where the property affected by the decision is located or, if no property is affected, in the county where the dispute arose. The parties may stipulate that the matter be transferred to another county if the circuit court of that county consents. *Id*.

Certain cases, controlled in other respects by Wis. Stat. § 227.53, have different venue requirements from those contained in Wis. Stat. § 227.53. *See, e.g.*, Wis. Stat. §§ 73.0301(2)(b)2., 77.59(6)(b), 108.227(6), 182.70(6), 182.71(5)(g). This trap for the unwary was made somewhat less troublesome by the ruling in *Shopper Advertiser, Inc. v. Department of Revenue*, 117 Wis. 2d 223, 344 N.W.2d 115 (1984), in which the plaintiff taxpayers mistakenly relied on the former Wis. Stat. § 227.16(1)(a) (now Wis. Stat. § 227.53(1)(a)) and commenced judicial review proceedings in Rock County, rather than in Dane County as then required by Wis. Stat. § 77.59(6)(b). The Dane County venue was controlling, given the disclaimer in what was then Wis. Stat. § 227.16(1) (now Wis. Stat. § 227.53(1)) that its provisions do not apply when otherwise specifically provided by law. The Rock County Circuit Court transferred the matter to Dane County. The supreme court upheld the transfer, noting that venue goes not to subject-matter jurisdiction but to the competency of a court to proceed to judgment. *Shopper Advertiser*, 117 Wis. 2d at 230. The supreme court approved the transfer under Wis. Stat. § 807.07, which governs general procedural irregularities, on the ground that the confusing nature of Wis. Stat. ch. 227 could lead a party to make a good-faith mistake as to venue. The court noted further that timely filing in an improper venue tolled the 30-day filing period of Wis. Stat. § 227.16(1)(a) (now Wis. Stat. § 227.53(1)(a)). *Shopper Advertiser*, 117 Wis. 2d at 234–36. In the absence of a good-faith mistake as to venue, however, the appropriate remedy is dismissal. *See DWD v. LIRC*, 2016 WI App 21, ¶¶ 26, 32, 367 Wis. 2d 609, 877 N.W.2d 620.

C. Service [§ 28.12]

Timely service of the petition for judicial review is necessary to give the circuit court subject-matter jurisdiction. *See Sunnyview Vill., Inc. v. Department of Admin.*, 104 Wis. 2d 396, 399, 311 N.W.2d 632 (1981); *Weisensel v. Department of Health & Soc. Servs.*, 179 Wis. 2d 637, 643, 508 N.W.2d 33 (Ct. App. 1993); *Johnsonville Sausage v. Department of Revenue*, 113 Wis. 2d 7, 9, 334 N.W.2d 269 (Ct. App. 1983). The petitioner must serve the administrative agency within 30 days after service of the agency's decision. Wis. Stat. § 227.53(1)(a)2., 2m. Service of the petition on the agency must be by personal service or by certified mail. Wis. Stat. § 227.53(1)(a)1. Service is complete on mailing. *See, e.g.*, *Trojan v. Board of Regents*, 104 Wis. 2d 277, 280, 311 N.W.2d 586 (1981).

In addition to serving the agency, the petitioner must serve the petition on all parties who appeared in the underlying agency proceeding. Wis. Stat. § 227.53(1)(c). This service must take place no later than 30 days after instituting judicial review by serving the petition on the agency and filing the petition with the clerk of circuit court. *Id*. Service on the parties to the underlying proceeding may be by personal service, certified mail, or, when service is timely admitted in writing, by first-class mail. *Id*.

Wis. Stat. § 227.53(1)(c) provides that service on a party may be either on the party or upon the party's attorney of record. Wis. Stat. § 227.53(1)(c) also provides that a court may not dismiss a review proceeding under Wis. Stat. ch. 227 solely because of failure to serve the party or the party's attorney, unless the person not served was listed as a party or the party's attorney in the agency's decision under Wis. Stat. § 227.47.

Identifying the proper agency to name and serve as the respondent can sometimes be difficult. *See, e.g.*, *Sunnyview Vill., Inc. v. Department of Admin.*, 104 Wis. 2d 396, 311 N.W.2d 632 (1981).

Apparently in response to this difficulty, Wis. Stat. ch. 227 now requires the agency's decision not only to include a notice of the right to judicial review and the time allowed for review but also to identify the party to be named as respondent if a petition for judicial review is filed. Wis. Stat. § 227.48(2). The agency decision must also provide the names and addresses of all persons who appeared in the administrative proceedings and might be considered parties in a potential action for judicial review. Wis. Stat. § 227.47(1).

In addition, Wis. Stat. § 227.53(1)(b) specifically identifies the proper respondent in certain actions for judicial review. The statute states:

> [I]n petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:
>
> 1. The tax appeals commission, the department of revenue.
>
> 3. The credit union review board, the office of credit unions.
>
> 4. The banking institutions review board, the division of banking, except if the petitioner is the division of banking, the prevailing parties before the banking institutions review board shall be the named respondents.

When ambiguity exists as to the specific party to be served, Wis. Stat. § 227.53(1) must be liberally construed in favor of allowing consideration of the merits, unless that construction was neither reasonable nor logical under the circumstances. *All Star Rent A Car, Inc. v. DOT*, 2006 WI 85, ¶ 41, 292 Wis. 2d 615, 716 N.W.2d 506.

D. Contents of Petition [§ 28.13]

The petition for judicial review of an administrative decision must establish the petitioner's standing to seek review by stating (1) the nature of the petitioner's interests, and (2) the facts showing that the petitioner is aggrieved by the decision. Wis. Stat. § 227.53(1)(b); *see also supra* § 28.8. The petition must also identify the issues to be reviewed; these must be presented in the context of the scope of review set forth in Wis. Stat. § 227.57. *See* Wis. Stat. § 227.53(1)(b); *see also infra* §§ 28.17–.22.

The petition must designate as petitioner the person seeking review and serving the petition; the agency whose decision is sought to be reviewed must be designated as respondent. *See supra* § 28.12 (identifying proper respondent).

The petition essentially serves the function of a combined notice of appeal and complaint. The petition may be amended with leave of the circuit court, even after the time for filing and serving it has passed. Wis. Stat. § 227.53(1)(b).

E. Response: Notice of Appearance; Petition to Intervene; Motion to Dismiss [§ 28.14]

Every person served with a petition for judicial review who desires to participate in the review must serve and file a notice of appearance. Wis. Stat. § 227.53(2). This notice of appearance must be served on the petitioner within 20 days after service of the petition. *Id*. Except in the case of a notice of appearance by a named respondent, the notice must also be served on the named respondent and the attorney general. Within 10 days after its service, the notice, along with proof of service, must be filed with the clerk of the circuit court reviewing the decision. *Id*.

The notice of appearance must state the person's position on each material allegation in the petition and on the disposition of the review. In other words, the notice of appearance must state whether the agency decision should be affirmed, vacated, modified, or reversed. *Id*.

After the notices of appearance have been served and filed, service of any subsequent papers is required only on those persons who have chosen to participate by filing the notice or who have been allowed to intervene. *Id*.

The circuit court may permit interested persons to intervene. Wis. Stat. § 227.53(1)(d). An interested person may seek intervention by filing and serving a petition to intervene at least five days before the date of the hearing on the petition for review. *Id*. As a practical matter, however, a person should file a petition to intervene earlier to avoid potential prejudice to the parties and to avert any other problems that might arise because of a last-minute filing.

A respondent who has served a notice of appearance may move to dismiss the petition no later than 20 days after the time for filing notices of appearance. Wis. Stat. § 227.56(3). The only ground for the motion is lack of standing. *Id.*; *see also supra* § 28.8. Upon hearing the motion to dismiss, the circuit court may allow the petitioner to amend the petition if the proposed amendment was served on the parties before the hearing on the motion. Wis. Stat. § 227.56(3).

VI. Judicial Review Under Wis. Stat. ch. 227 [§ 28.15]

A. Record on Review [§ 28.16]

Judicial review under Wis. Stat. ch. 227 is confined to the record of the agency proceedings, including pleadings, notices, testimony, exhibits, findings, decisions, orders, and exceptions. Wis. Stat. § 227.55(1). The parties may stipulate to present an abbreviated record, and a party, other than an agency, who refuses to so stipulate may be liable for additional costs taxed by the circuit court. *Id*. If the record is incomplete, a party should move the circuit court to correct the record so that the issues may be fairly and completely considered. *Id*.; *Omernick v. DNR*, 100 Wis. 2d 234, 249, 301 N.W.2d 437 (1981).

The record must be transmitted to the circuit court within 30 days after serving the agency with the petition for review. Wis. Stat. § 227.55(1). The time for filing may be extended by leave of the court. *Id*. This would be most likely to occur if preparation of the transcripts had not been completed by the filing date. If any portion of the record is in the form of an audio or video recording, the agency may transmit the recording to the reviewing court in lieu of a transcript unless the court requests a transcript. *See* Wis. Stat. § 227.55(2).

If cause is shown, the circuit court may grant leave to present evidence that was not presented to the agency in the proceedings below. A motion to present additional evidence must be made before the date set for trial and must show that (1) the evidence to be adduced is material, and (2) there were good reasons for failing to present this evidence in the agency proceedings. Wis. Stat. § 227.56(1).

The court rarely grants motions to present additional evidence. If the court does grant leave, however, it remands the matter to the agency, which takes the testimony and may then modify its findings and decision as appropriate. *Id*. The record is then returned to the reviewing court, supplemented with the additional testimony and new findings and decision, if any. *Id*. The only type of

additional testimony that would be taken in the circuit court, instead of before the agency on remand, is testimony about claimed irregularities in the procedure before the agency. Wis. Stat. § 227.57(1).

B. Scope of Review [§ 28.17]

1. In General [§ 28.18]

The review may be brought on for trial or hearing at any time after the expiration of the time for serving the notices of appearance required by Wis. Stat. § 227.53(2), *see supra* § 28.14, provided that at least 10 days' notice is afforded. Wis. Stat. § 227.56(2). Although the rule seems to contemplate a hearing, the matter may be decided without hearing. Shortly after the record is filed, the circuit court ordinarily sets the matter for hearing, if any; orders briefing; and sets a briefing schedule.

Wis. Stat. § 227.57 sets forth the basic rules governing judicial review of administrative decisions. The court must uphold the agency's decision unless a specific provision of Wis. Stat. § 227.57 reveals a basis for setting it aside, modifying, remanding, or ordering agency action. Wis. Stat. § 227.57(2). The reviewing court must independently examine disputed issues of agency procedure, interpretations of law, determinations of fact, and exercises of administrative discretion. Wis. Stat. § 227.57(3). An agency has only those powers expressly or impliedly granted by statute, and the reviewing court must resolve any reasonable doubt as to the agency's implied power against the agency. *Myers v. DNR*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47.

Within the limits imposed elsewhere by Wis. Stat. § 227.57, the circuit court may grant whatever relief is appropriate, irrespective of the demands in the petition. Wis. Stat. § 227.57(9). If the court's decision requires further proceedings or agency action, the court may issue any interlocutory orders necessary to preserve the rights of any party or the public pending further proceedings or action. *Id*. The circuit court has no power to grant default judgment against the agency. *Wagner v. Medical Examining Bd.*, 181 Wis. 2d 633, 511 N.W.2d 874 (1994).

2. Procedural Errors: Wis. Stat. § 227.57(4) [§ 28.19]

The standards of review the court must apply are set forth in Wis. Stat. § 227.57(4), (5), (6), and (8). First, when a procedural error is alleged, Wis. Stat. § 227.57(4) provides that the circuit court must remand the matter for further action if it finds that "either the fairness of the proceeding or the correctness of the action has been impaired by a material error in procedure or a failure to follow a prescribed procedure." This rule governs judicial review of alleged denials of due process. *See Patterson v. Board of Regents*, 119 Wis. 2d 570, 578, 350 N.W.2d 612 (1984); *Bracegirdle v. Board of Nursing*, 159 Wis. 2d 402, 416, 464 N.W.2d 111 (Ct. App. 1990). Note that the general rule of strict compliance with procedural requirements, *see supra* § 28.6, does not apply here. By its very terms, Wis. Stat. § 227.57(4) requires the circuit court to find not just a failure to comply with procedural requirements, but also that the fairness of the proceedings or correctness of the trial has been impaired by the noncompliance. In other words, prejudice must be shown; mere procedural error is insufficient. *Seebach v. Public Serv. Comm'n*, 97 Wis. 2d 712, 721, 295 N.W.2d 753 (Ct. App. 1980). The petitioner bears the burden of proving that the error caused material prejudice. *See, e.g.*, *id.*

3. Errors of Law: Wis. Stat. § 227.57(5) [§ 28.20]

Reviewing courts had developed an extensive body of law establishing levels of deference given to administrative agencies' conclusions of law before 2018. Then, however, the supreme court upended this years-old practice, concluding that, going forward, agency decisions will be reviewed under the same standard as applied to circuit court decisions on matters of law: de novo. *Tetra Tech EC, Inc., v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21 (Kelly, J., lead opinion). Although a majority of the court agreed that the practice of deference to an agency's conclusions of law must end, the justices disagreed about the basis for that decision. *Id.* ¶ 3 n.3. Justice Kelly's lead opinion stated that deference is an unconstitutional infringement on the exclusive powers of the judiciary to determine the law. *Id.* ¶ 54. Justice Grassl Bradley joined the lead opinion in full. *Id.* ¶ 3 n.4. Other justices, despite concurring in the judgment, took the position that the constitutional issue need not be reached because deference was a judicially created practice that could and should be rejected by the judiciary. *See, e.g.*, *id.* ¶ 135 (Ziegler, J., concurring); *id.* ¶ 166 (Gableman, J., concurring).

While the multiple opinions make *Tetra Tech* a challenging read, the bottom line is clear: deference to agency decisions on questions of law is no more. All that remains is the legislative edict of Wis. Stat. § 227.57(10) that the court give "due weight" to the

experience, technical competence, and specialized knowledge of an administrative agency when a court conducts its de novo review. *Tetra Tech*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496 (Kelly, J., lead opinion). As suggested by Justice Kelly's lead opinion, such due weight really may be a matter of persuasion rather than deference. *Id.* ¶ 78. In another case, the supreme court clarified that "conclusions of law" means both the agency interpretations of law and the agency application of that law to the facts. *McAdams v. Marquette Univ.*, 2018 WI 88, ¶ 51 & n.17, 383 Wis. 2d 358, 914 N.W.2d 708.

The *Tetra Tech* standard of de novo review of agency conclusions of law is codified in Wis. Stat. § 227.57(11). *See* 2017 Wis. Act 369.

A few justices expressed concern that *Tetra Tech*'s rejection of years of case law might open old decisions to challenge. *See Tetra Tech*, 2018 WI 75, ¶ 112, 382 Wis. 2d 496 (Bradley, A.W., J., concurring); *id.* ¶ 139 (Ziegler, J., concurring). Justice Kelly's lead opinion rejected this concern, stating that relief under Wis. Stat. § 806.07 is not available on the ground that the law applicable at the time has subsequently been overruled. *Id.* ¶¶ 89–93 (Kelly, J., lead opinion).

Finally, *Tetra Tech* made clear that, although arising from a Wis. Stat. ch. 227 review, its decree abandoning deference to agencies' conclusions of law applies to all administrative decisions. *Id.* ¶ 11 n.8.

4. Factual Findings: Wis. Stat. § 227.57(6) [§ 28.21]

Factual findings are reviewed under Wis. Stat. § 227.57(6). If the findings rest on facts adduced in a proceeding in a contested case, the court must affirm them if they are supported by substantial evidence in the administrative record. Substantial evidence does not mean a preponderance of the evidence. Rather, the test is whether reasonable minds could arrive at the same conclusion the agency did. *Madison Gas & Elec. Co. v. Public Serv. Comm'n*, 109 Wis. 2d 127, 133, 325 N.W.2d 339 (1982).

The reviewing court cannot weigh the evidence or pass on the credibility of witnesses. *See, e.g.*, *Omernick v. DNR*, 100 Wis. 2d 234, 251, 301 N.W.2d 437 (1981). So long as reasonable minds could concur, the court must uphold the agency's decision, even if it is against the great weight and clear preponderance of the evidence. *Id*. In applying the substantial-evidence test of Wis. Stat. § 227.57(6), the court must observe the mandate of Wis. Stat. § 227.57(10) to accord due weight to the agency's expertise. *See Madison Gas & Elec.*, 109 Wis. 2d at 133. If, however, the agency's factual finding is based entirely on undisputed evidence and there is no credibility issue, the reviewing court is not bound by the agency determination. *Brown v. Wisconsin Dep't of Children & Fams.*, 2012 WI App 61, ¶ 11, 341 Wis. 2d 449, 819 N.W.2d 827.

5. Discretionary Determinations: Wis. Stat. § 227.57(8) [§ 28.22]

Discretionary determinations are subject to review pursuant to Wis. Stat. § 227.57(8). A reviewing court must not substitute its judgment for that of an agency on an issue of discretion and must accord due weight to the agency's expertise. *Eau Claire Cnty. v. DNR*, 119 Wis. 2d 62, 63, 349 N.W.2d 723 (Ct. App. 1984). A court cannot exercise discretion committed to the agency. *See Kammes v. Mining Inv. & Local Impact Fund Bd.*, 115 Wis. 2d 144, 157, 340 N.W.2d 206 (Ct. App. 1983).

The reviewing court must reverse or remand if it finds that the agency's exercise of discretion exceeds the agency's authority, conflicts with an agency rule or official agency policy or practice (if the deviation is not satisfactorily explained), or otherwise violates a constitutional or statutory provision. Wis. Stat. § 227.57(8). Review of inconsistencies and deviations from prior agency practice occurs in the context of determining whether they have a rational basis or are arbitrary and capricious. *Arrowhead United Teachers Org. v. WERC*, 116 Wis. 2d 580, 589, 342 N.W.2d 709 (1984). In general, an agency's discretion is reviewed in the same manner as a circuit court's discretion. *See Madison Gas & Elec. Co. v. Public Serv. Comm'n*, 109 Wis. 2d 127, 137, 325 N.W.2d 339 (1982); *see also supra* § 3.20.

A court must not substitute its judgment for that of an agency on a legislative matter. Wis. Stat. § 227.57(8); *Town of Beloit v. City of Beloit (In re City of Beloit)*, 37 Wis. 2d 637, 647, 155 N.W.2d 633 (1968). Legislative-type decisions, which involve questions of policy and discretion, are reviewed under the arbitrary-and-capricious standard. *J.F. Ahern Co. v. Building Comm'n*, 114 Wis. 2d 69, 95, 336 N.W.2d 679 (Ct. App. 1983).

6. Disposition [§ 28.23]

Upon reversal of an agency decision reversing an order of a hearing examiner, the proper remedy is to remand to the agency, not to reinstate the order. *See Heine v. Chiropractic Examining Bd.*, 167 Wis. 2d 187, 194, 481 N.W.2d 638 (Ct. App. 1992).

VII. Temporary Relief Under Wis. Stat. ch. 227 [§ 28.24]

Filing of a petition for judicial review does not stay enforcement of the agency decision. Wis. Stat. § 227.54. The circuit court may grant a stay on such terms as it deems proper, subject to limitations in cases under the following sections of the statutes: Wis. Stat. § 196.43, regarding regulation of public utilities; Wis. Stat. § 253.06, regarding the Women, Infants, and Children supplemental nutrition program; and Wis. Stat. § 448.02(9), regarding proceedings of the Medical Examining Board.

VIII. Appeal to the Court of Appeals and Supreme Court Under Wis. Stat. ch. 227 [§ 28.25]

Upon entry of a final order or judgment of the circuit court, an appeal may be taken to the court of appeals under the procedure described in chapter 5, *supra*. The time for filing the appeal is determined under the 45/90 rule that ordinarily applies in civil appeals. Wis. Stat. §§ 227.58, 808.04(1); *see also supra* § 5.4. Note that an order terminating a circuit court action for judicial review, but remanding the matter to the agency, is considered a final order because agency proceedings are not matters in litigation pursuant to Wis. Stat. § 808.03(1). *Bearns v. DILHR*, 102 Wis. 2d 70, 76, 306 N.W.2d 22 (1981). *But see Citizens for U, Inc. v. DNR*, 2010 WI App 21, ¶ 19, 323 Wis. 2d 767, 780 N.W.2d 194 (holding that order remanding to agency for further proceedings was not final when remand was for very specific issues and order contemplated further litigation in the circuit court on such issues).

The scope of review in an appeal to the court of appeals, as well as in any subsequent review by the supreme court, is identical to the scope of review in the circuit court. *See, e.g.*, *West Bend Educ. Ass'n v. WERC*, 121 Wis. 2d 1, 11 n.8, 357 N.W.2d 534 (1984); *see also supra* §§ 28.17–.22. Thus, the scope of review on appeal is defined by Wis. Stat. § 227.57 and is, essentially, a de novo review of the agency decision, not the decision of the circuit court. *See J&E Invs. v. Division of Hearings & Appeals*, 2013 WI App 90, ¶ 10, 349 Wis. 2d 497, 835 N.W.2d 271 ("We review the [agency's] legal conclusions, not those of the trial court."). A circuit court may reconsider its decision pending appeal pursuant to Wis. Stat. § 806.07. *Metro Greyhound Mgmt. Corp. v. Wisconsin Racing Bd.*, 157 Wis. 2d 678, 699, 460 N.W.2d 802 (Ct. App. 1990).

The right to substitution of judge afforded by Wis. Stat. § 801.58(7) applies to appeals to the court of appeals and supreme court under Wis. Stat. ch. 227. *State ex rel. Town of Delavan v. Walworth Cnty. Cir. Ct.*, 167 Wis. 2d 719, 482 N.W.2d 899 (1992).

IX. Judicial Review of Worker's Compensation and Unemployment Insurance Cases [§ 28.26]

Judicial review of worker's compensation decisions by the Labor and Industry Review Commission (LIRC or the commission) is *not* controlled by Wis. Stat. ch. 227. Rather, such review is under Wis. Stat. §§ 102.23, 102.24, and 102.25. Much of the following discussion of judicial review of worker's compensation cases also applies to judicial review of unemployment insurance cases, for which Wis. Stat. § 108.09(7) sets forth provisions similar, but not identical, to those for worker's compensation review.

Comment. Although administrative review functions before judicial review have been transferred from the Department of Workforce Development to the Division of Hearings and Appeals in the Department of Administration, the judicial review sections of Wis. Stat. ch. 102 discussed in this chapter essentially remain intact. The changes to Wis. Stat. §§ 102.23, 102.24, and 102.25 contained in the enabling legislation—2015 Wis. Act 55—appear to be nonsubstantive, simply reflecting the transfer of administrative review functions to the Division of Hearings and Appeals.

Any person aggrieved by the commission's decision may seek review in the circuit court. Wis. Stat. § 102.23(1)(a). An aggrieved person is defined as any person or agency whose substantial interests are adversely affected by the agency decision. *Cornwell Pers. Assocs. v. DILHR*, 92 Wis. 2d 53, 61, 284 N.W.2d 706 (Ct. App. 1979). The following two-pronged test for standing under Wis. Stat. ch. 227 is also used in worker's compensation review: (1) whether the challenged action causes actual injury to the petitioner's interests, and (2) whether the petitioner's interest is recognized by law. *Id.*; *see also supra* § 28.8.

The only commission orders that may be reviewed are ones that grant or deny compensation. Wis. Stat. § 102.23(1)(a)1.; *Guerin v. LIRC*, 121 Wis. 2d 183, 186–87, 359 N.W.2d 162 (Ct. App. 1984). These may be reviewed whether they are final or interlocutory.

Wis. Stat. § 102.23(1)(a)1.

The review is commenced by serving the commission with a summons and complaint and filing the summons and complaint with the clerk of circuit court. Wis. Stat. § 102.23(1)(a)2. The summons and complaint must name as defendants both the commission and all persons that the commission identifies as necessary parties on review. *Id.* Failure to name as defendants all adverse parties to the underlying proceeding renders the circuit court incompetent to conduct judicial review. *Xcel Energy Servs., Inc., v. LIRC*, 2013 WI 64, ¶¶ 29, 31–36, 44, 59, 349 Wis. 2d 234, 833 N.W.2d 665 (defining *adverse party*). This danger is reduced by the requirement that all commission orders name all persons who must be named as defendants if a party seeks review. Wis. Stat. § 102.23(1)(a)1. The summons and complaint must be served and filed within 30 days after the commission's order. Wis. Stat. § 102.23(1)(a)2. Service on the commission is deemed service on all parties, but sufficient copies must be served to enable the commission to mail one to each defendant. Wis. Stat. § 102.23(1)(b).

Venue is in the circuit court of the county in which the plaintiff resides, unless the plaintiff is a state agency, in which case the proceedings must be brought in the circuit court of the county in which the defendant resides. Wis. Stat. § 102.23(1)(a)3. If the plaintiff is a nonresident, venue is in the circuit court for Dane County. *Aparacor v. DILHR*, 97 Wis. 2d 399, 406–07, 293 N.W.2d 545 (1980). Pursuant to Wis. Stat. § 102.23(1)(a), if all parties stipulate and the court agrees, the proceedings may be brought in any county. *See DWD v. LIRC*, 2015 WI App 56, ¶ 8, 364 Wis. 2d 514, 869 N.W.2d 163. Failure of nonparticipating parties to agree to venue does not vitiate stipulations by the remaining parties. *Id.* ¶¶ 11–14. But the venue provision of Wis. Stat. § 102.23(1)(a) is central to the statutory scheme, and, therefore, failure to comply with its mandates deprives the circuit court of competency. *DWD v LIRC*, 2016 WI App 21, ¶ 19, 367 Wis. 2d 609, 877 N.W.2d 620. As in cases decided under Wis. Stat. ch. 227 generally (*see supra* § 28.11), in the absence of a good-faith mistake as to venue, the appropriate remedy is dismissal. *See DWD v. LIRC*, 2016 WI App 21, ¶¶ 26, 32, 367 Wis. 2d 609. The summons and complaint need not be verified, but they must state the grounds on which judicial review is sought. Wis. Stat. § 102.23(1)(b). These grounds should be presented in the context of the criteria upon which the commission's order may be set aside. *See* Wis. Stat. § 102.23(1)(e). The commission and most defendants must serve an answer to the complaint within 20 days after service of the complaint. Wis. Stat. § 102.23(1)(c). If the defendant is an insurance company, the answer must be served within 45 days. Wis. Stat. § 102.23(1)(cm). Any other defendants who wish to participate generally must also serve an answer within the same 20-day period, although insurance companies may serve an answer within 45 days after service of the complaint. Wis. Stat. § 102.23(1)(cm). Defendants other than the commission may file a cross-claim or counterclaim with their answers. Wis. Stat. § 102.23(1)(c).

Upon the filing of the summons and complaint, the commission must make a return to the court of the record and transcript, and upon this return, the court may set the matter for briefing with or without a hearing. Wis. Stat. § 102.23(1)(d). The parties must be given at least 10 days' notice of any hearing. *Id*. The statute does not impose a time limit on the commission's duty to make a return, and this omission can result in significant delay.

During the circuit court's review, and even after further review has been sought in an appellate court, the parties may cause the court to remand the record to the commission for the purpose of working out a settlement or compromise. Wis. Stat. §§ 102.24(2), 102.25(1). Thus, the institution of review proceedings should not necessarily be viewed as a burning of bridges between the parties.

After the circuit court's hearing, if any, or upon consideration of the briefs, the court may confirm or set aside the commission's order or award. The court's ability to set aside an order or award is limited to one or more of the following grounds:

1. The commission acted without or in excess of its powers.

2. The order or award was procured by fraud.

3. The commission's findings of fact do not support the order or award.

Wis. Stat. § 102.23(1)(e).

The fraud referred to in Wis. Stat. § 102.23(1)(e) is fraud on the part of the commission. *Borello v. Industrial Comm'n*, 26 Wis. 2d 62, 69–70, 131 N.W.2d 847 (1965). Allegations of fraud constitute the only basis for which additional evidence may be introduced in the circuit court on review. *See Weibel v. Clark*, 87 Wis. 2d 696, 708, 275 N.W.2d 686 (1979). Actions of the commission without, or in excess of, its powers can encompass a wide range of factors, including denial of due process, errors of

law, erroneous exercise of discretion, jurisdictional problems, and questions of fact. James T. Haferman, Comment, *Judicial Review of Workmen's Compensation Cases*, 1973 Wis. L. Rev. 576, 581.

Judicial review of the commission's findings of fact is limited to the question whether they are supported by credible and substantial evidence. Wis. Stat. § 102.23(6). Substantial evidence means evidence that is more than mere conjecture; that is relevant, probative, and credible; and that will allow a reasonable fact-finder to base a conclusion on it. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). Substantial evidence need not constitute the preponderance of the evidence. *Id*. at 52 (citing *R.T. Madden, Inc. v. DILHR*, 43 Wis. 2d 528, 169 N.W.2d 73 (1969)).

Until 2018, the commission's conclusions of law were entitled to a level of deference developed in case law over the years. In that year, however, the supreme court did away with such deference in a Wis. Stat. ch. 227 case and determined that its decision in that case extends to all administrative agency decisions. *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 11 n.8, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion); *see also supra* § 28.20. Accordingly, review in worker's compensation and unemployment insurance cases is now de novo on questions of law.

A discretionary determination by the commission will not be overturned absent a flagrant abuse or an erroneous exercise of discretion. *See, e.g.*, *Appleton Elec. Co. v. Minor*, 91 Wis. 2d 825, 831, 284 N.W.2d 99 (1979). An abuse or erroneous exercise of discretion constitutes an action in excess of the commission's powers. Except for the requirement that the abuse be flagrant, the commission's discretionary decisions are apparently measured under the same standards as are a circuit court's discretionary determinations. *See supra* § 3.20. In other words, a discretionary decision of the agency will be affirmed if it reflects a reasoned application of the appropriate law to the facts. *In re Bar Admission of Altshuler*, 171 Wis. 2d 1, 8, 490 N.W.2d 1 (1992); *Kwaterski v. LIRC*, 158 Wis. 2d 112, 120, 462 N.W.2d 534 (Ct. App. 1990).

Errors and irregularities by the commission may be harmless. The petitioner has the burden of showing that the error or irregularity has resulted in prejudice. Wis. Stat. § 102.23(2); *Weibel*, 87 Wis. 2d at 704.

The circuit court's final order or judgment may be appealed under the 45/90 rule set forth in Wis. Stat. § 808.04(1). *See* Wis. Stat. § 102.25(1); *see also supra* § 5.4. The circuit court may not condition the taking of an appeal on the filing of an undertaking. Wis. Stat. § 102.25(1). Additionally, no filing fees may be charged in the circuit court. Wis. Stat. § 102.26(1). Indeed, the charging or receipt of any fees may be grounds for imposing a double forfeiture. Wis. Stat. § 102.26(4). Note that an order terminating judicial review, but remanding the matter to the agency for further action, is considered a final order under Wis. Stat. § 808.03(1), because agency proceedings are not matters in litigation. *Bearns v. DILHR*, 102 Wis. 2d 70, 76, 306 N.W.2d 22 (1981). *But see Citizens for U, Inc. v. DNR*, 2010 WI App 21, ¶ 19, 323 Wis. 2d 767, 780 N.W.2d 194 (holding that order remanding to agency for further proceedings was not final when remand was for very specific issues and order contemplated further litigation in the circuit court on such issues).

On an appeal, the appellate court reviews the commission's decision, not the circuit court's decision. *County of Dane v. LIRC*, 2009 WI 9, ¶ 14, 315 Wis. 2d 293, 759 N.W.2d 571. Although the court of appeals may find the circuit court's reasoning persuasive, it owes no special deference to the circuit court's decision. *Id*.

X. Certiorari
[§ 28.27]

One of the most confusing aspects of administrative appeals is the use of certiorari as a review mechanism. One of the traditional prerogative writs, certiorari is now rarely used in any context other than judicial review of actions by administrative agencies. Notwithstanding its heritage as a writ, certiorari is essentially a review mechanism like appeal, except that it has its own, limited standards of review. Certiorari is available, as with an appeal, only for the review of a final determination. *State ex rel. Grzelak v. Bertrand*, 2003 WI 102, ¶ 12, 263 Wis. 2d 678, 665 N.W.2d 244.

There are two general categories of certiorari: statutory and common law. Statutory certiorari applies when a statute provides that review is by certiorari. *See, e.g.*, Wis. Stat. § 70.47(13) (appeal from property tax board of review). A statute that provides for review but does not specify certiorari does not preclude application of certiorari principles in that review. *See Nowell v. City of Wausau*, 2013 WI 88, ¶¶ 23, 33, 48, 351 Wis. 2d 1, 838 N.W.2d 852 (holding that statute's context warranted certiorari rather than de novo review). Common-law certiorari is available as a remedy whenever there is no express statutory method of review. *See, e.g.*, *State ex*

rel. Palleon v. Musolf, 117 Wis. 2d 469, 473 n.4, 345 N.W.2d 73 (Ct. App.) (stating that certiorari was proper because Department of Revenue order expressly exempt from review under former Wis. Stat. § 227.15 (now Wis. Stat. § 227.52)), *aff'd*, 120 Wis. 2d 545, 356 N.W.2d 487 (1984); *Coleman v. Percy*, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980) ("[W]e have consistently stated that the … refusal to grant [discretionary] parole may be reviewed by common law certiorari.").

It is unclear whether any real significance remains to the distinction between common-law and statutory certiorari, except that common-law certiorari is discretionary and statutory certiorari is of right. *See Coleman*, 96 Wis. 2d at 584 n.5. Otherwise, both types of certiorari are identical except insofar as an individual statute may provide.

Traditionally, the issues on common-law certiorari were limited to whether the agency's action was within its jurisdiction. *See, e.g.*, *Browndale Int'l, Ltd. v. Board of Adjustment*, 60 Wis. 2d 182, 198–99, 208 N.W.2d 121 (1973). This is no longer the case. The circuit court's common-law certiorari review now encompasses the following issues: (1) whether the agency or other entity kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50, ¶ 41, 362 Wis. 2d 290, 865 N.W.2d 162. These review standards accord a presumption of correctness and validity to the prior decision. *Nowell*, 2013 WI 88, ¶ 24, 351 Wis. 2d 1.

Note. Because certiorari review is not a proceeding under Wis. Stat. ch. 227, this presumption of validity is not contrary to the supreme court's holding in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶ 11 n.8, 382 Wis. 2d 496, 914 N.W.2d 21, that administrative interpretations of law are entitled to no deference. *See Grycowski v. Milwaukee Emps.' Ret. Sys./Annuity & Pension Bd.*, 2021 WI App 7, ¶ 29 n.2, 395 Wis. 2d 722, 953 N.W.2d 904 (noting *Tetra Tech*'s inapplicability to "judicial review of municipal decisions").

Common-law certiorari is not available for review of discretionary determinations. *Franklin v. Housing Auth.*, 155 Wis. 2d 419, 424–25, 455 N.W.2d 668 (Ct. App. 1990). The issue whether an agency acted according to law includes common-law concepts such as due process and fairness, which require, for example, the keeping of an accurate record to permit review. *State ex rel. Lomax v. Leik*, 154 Wis. 2d 735, 739–40, 454 N.W.2d 18 (Ct. App. 1990). Equitable principles such as estoppel, however, have no application in certiorari. *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶ 69, 353 Wis. 2d 307, 845 N.W.2d 373.

Review in a statutory certiorari case is limited to the same four-issue test employed in common-law certiorari unless the statute enlarges the scope of review. *Ottman v Town of Primrose*, 2011 WI 18, ¶¶ 35–36, 332 Wis. 2d 3, 796 N.W.2d 411.

The court of appeals employs the same test for review in certiorari cases as that employed by the circuit court. *Palleon*, 117 Wis. 2d at 473. An appellate court looks at the record *ab initio* and is not bound by the circuit court's findings or conclusions. *State ex rel. Hippler v. Baraboo*, 47 Wis. 2d 603, 616, 178 N.W.2d 1 (1970). Ordinarily, on appeal of a circuit court order granting or denying certiorari, the court of appeals reviews the underlying agency decision, not the circuit court order. *State ex rel. Barksdale v. Litscher*, 2004 WI App 130, ¶ 7, 275 Wis. 2d 493, 685 N.W.2d 801. If, however, the circuit court did not reach the merits, but decided the matter on procedural grounds or claim preclusion, the court of appeals reviews the circuit court decision. *Id*. When reviewing a circuit court's decision on certiorari, the appellate court may reverse and remand to the agency for additional fact-finding if it concludes that relevant evidence that is not in the record on appeal may be available to decide the issue. *See Westel-Milwaukee Co. v. Walworth Cnty.*, 205 Wis. 2d 244, 252–54, 556 N.W.2d 107 (Ct. App. 1996).

Both the circuit courts and the appellate courts, however, are guided by the substantial-evidence test in their review of findings and conclusions in certiorari cases (i.e., whether reasonable minds could arrive at the same result as the agency). *Palleon*, 120 Wis. 2d at 549. A certiorari court must not substitute its view of the evidence for that of the agency. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). If there is more than one reasonable view of the evidence, the agency may choose among them, and its choice will not be upset on review. *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). On questions of law, the reviewing courts follow a standard of de novo review. *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶ 11 n.8, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion); *see also supra* § 28.20.

If a certiorari reviewing court determines that the agency did not act according to law, the remedy is to reverse and remand for a new hearing; a reviewing court may not direct that the agency perform a certain act. *Guerrero v. City of Kenosha Hous. Auth.*, 2011 WI App 138, ¶ 9, 337 Wis. 2d 484, 805 N.W.2d 127. If, however, the error cannot be cured on remand, outright reversal with no

remand is appropriate. *Id.* ¶ 12 n.5. If the case is remanded based on a finding that the administrative body applied the wrong legal standard, the administrative body cannot hold a new hearing and take new evidence to make new findings. *See Hartland Sportsmen's Club, Inc. v. City of Delafield*, 2020 WI App 44, ¶¶ 14–20, 393 Wis. 2d 496, 947 N.W.2d 214.

Certiorari must be sought in the circuit court within six months after entry of the decision to be reviewed unless a different time is prescribed by statute. *State ex rel. Enk v. Mentkowski*, 76 Wis. 2d 565, 575, 252 N.W.2d 28 (1977).

Comment. This six-month period is overlengthy and of questionable heritage, being based on the former civil appeal period of six months. *See Firemen's Annuity & Benefit Fund v. Krueger*, 24 Wis. 2d 200, 205, 128 N.W.2d 670 (1964). Inasmuch as the present appeal period is no more than 90 days, it might be proper for the supreme court to reduce this six-month period in a future decision.

Even in cases in which a specific statute sets forth the time for review, the event triggering that time may be an issue. *See Pulera v. Town of Richmond*, 2017 WI 61, 375 Wis. 2d 676, 896 N.W.2d 342. The statute in question in *Pulera*—Wis. Stat. § 68.13(1)—governs appeals from many types of municipal administrative decisions and provides for certiorari review within 30 days after receipt of the "final determination." Rejecting the position that the triggering event was the vote by the town board approving proposed highway modifications, the supreme court's lead opinion held that the final determination was the recording of a highway order by the register of deeds, concluding that this event gives public notice to potentially aggrieved parties. *Pulera*, 2017 WI 61, ¶¶ 22–29, 375 Wis. 2d 676. As noted in the concurring and dissenting opinions, however, this solution left open what will constitute a "final determination" when a municipal administrative body rejects the proposed actions or modifications and issues no order for the register of deeds to record. *Id.* ¶ 51 (Bradley, R.G., J., concurring); *id.* ¶ 64 (Bradley, A.W., J., dissenting); *see also Moreschi v. Village of Williams Bay*, 2020 WI 95, ¶¶ 19–24, 395 Wis. 2d 55, 953 N.W.2d 318 (concluding that triggering event for review of zoning board of appeals "decision" under Wis. Stat. § 62.23(7)(e)10. is board's filing of a "determination form," not the filing of the minutes).

Certiorari review is a well-established mode of review for prisoners who seek to challenge prison disciplinary decisions. *See State ex rel. Curtis v. Litscher*, 2002 WI App 172, ¶ 12, 256 Wis. 2d 787, 650 N.W.2d 43. A *mailbox rule* is applicable to self-represented prisoners in certiorari actions. *See State ex rel. Shimkus v. Sondalle*, 2000 WI App 238, 239 Wis. 2d 327, 620 N.W.2d 409. This rule provides that petitions for certiorari filed by self-represented prisoners are timely if mailed or delivered to institutional authorities for mailing before expiration of the applicable time period. *Id.*; *see also supra* § 18.4 (discussing mailbox rule for briefs, appendices, and petitions for review filed by self-represented (pro se) inmates). This does not, however, excuse a petitioner from the duty to file a proper petition supported by proper documentation with the proper fee. *State ex rel. Tyler v. Bett*, 2002 WI App 234, ¶ 15, 257 Wis. 2d 606, 652 N.W.2d 800. Consistent with the leniency afforded certiorari petitions filed by prisoners, such petitions, filed in the absence of clear law establishing the proper review procedures, will be heard on the merits of the prisoner's interpretation, if that interpretation is reasonable under the circumstances. *State ex rel. Grzelak v. Bertrand*, 2003 WI 102, ¶¶ 19, 25, 263 Wis. 2d 678, 665 N.W.2d 244. This leniency has its limits, however. *See, e.g.*, *State ex rel. Myers v. Smith*, 2009 WI App 49, ¶ 17, 316 Wis. 2d 722, 766 N.W.2d 764 (declining review of a one-sentence challenge to the constitutionality of an administrative code provision).

The time period for a prisoner to seek circuit court certiorari review is 45 days. Wis. Stat. § 893.735(2). That period may be tolled to allow for review when the prisoner asked counsel to seek certiorari and counsel failed to do so in timely fashion. *See State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 38, 270 Wis. 2d 235, 677 N.W.2d 259.

Ordinarily, a Wisconsin prisoner incarcerated in an out-of-state prison must seek relief for disciplinary actions that occurred in that prison in the state where the prison is located. *State ex rel. Myers v. Swenson*, 2004 WI App 224, ¶ 9, 277 Wis. 2d 749, 691 N.W.2d 357. When a prisoner can show that (1) judicial review is not available in that state and (2) a court in that other state has dismissed a disciplinary review proceeding for lack of jurisdiction or competence, then the prisoner may seek review by certiorari in Wisconsin. *Id.* ¶¶ 10–13; *see also State ex rel. Ponchik v. Bradley*, 2004 WI App 226, 277 Wis. 2d 768, 690 N.W.2d 860.

Like habeas corpus, mandamus, or any of the other traditional writs, certiorari may be commenced in the circuit court either by the issuance of a writ upon the filing of a petition or by the filing of a conventional complaint. Wis. Stat. §§ 753.04, 781.01, 801.02(5). In either case, the standard used to determine the sufficiency of the claimed error to warrant review and the filing in the circuit court of the return (i.e., the record of the agency proceedings) is the same as that employed to determine whether a civil complaint states a cause of action. *State ex rel. Tran v Speech*, 2010 WI App 58, ¶ 1 n.2, 324 Wis. 2d 567, 782 N.W.2d 106. The

return need not be filed in the circuit court before that court determines preliminary questions of sufficiency and jurisdiction. *See Bergstrom v Polk Cnty.*, 2011 WI App 20, ¶ 32, 331 Wis. 2d 678, 795 N.W.2d 482. An answer to a certiorari complaint or petition raising jurisdictional defects does not constitute a waiver of jurisdictional objections by participation in the proceedings. *Id.* ¶¶ 34–35.

Review by the court of appeals of the circuit court's final decision on certiorari is obtained by filing a notice of appeal in the time and manner prescribed for civil appeals. *See supra* ch. 5. A prisoner may access the funds in his or her prison release fund to pay for transcript fees necessary to appeal a circuit court order denying a petition for certiorari. *State ex rel. Akbar v. Kronzer*, 2004 WI App 108, ¶ 1, 273 Wis. 2d 749, 681 N.W.2d 280. Except in limited circumstances, a certiorari petition or complaint must name as a party the specific board or administrative body whose action is being challenged. *Acevedo v City of Kenosha*, 2011 WI App 10, ¶ 17, 331 Wis. 2d 218, 793 N.W.2d 500 (holding that city zoning board, rather than city, was the proper party).

Appendices

A Addresses and Phone Numbers Pertinent to Appellate Practice

B Clerks of Circuit Court

C Standards of Appellate Review

D Materials for Expedited Appeals

E Forms for Use in Appeals

F Wisconsin Rules of Appellate Procedure

G Interim Court Rule Governing Filing in the Supreme Court

Appendix A
Addresses and Phone Numbers Pertinent to Appellate Practice

1. Clerk of the Supreme Court and the Court of Appeals
   110 E. Main St. (Tenney Building), Ste. 215
   P.O. Box 1688
   Madison, WI 53701-1688
   Phone: (608) 266-1880
   Fax: (608) 267-0640
   Electronic Filing Information: https://www.wicourts.gov/ecourts/efileappellate/index.jsp

2. Court of Appeals Districts and Court Information Clerks
   (Note: No documents are filed directly with the districts)

   a. District I
      330 E. Kilbourn Ave., Ste. 1020
      Milwaukee, WI 53202-3161
      Phone: (414) 227-4680
      Fax: (414) 227-4051

   b. District II

2727 N. Grandview Blvd., Ste. 300
Waukesha, WI 53188-1671
Phone: (262) 521-5230
Fax: (262) 521-5419

c. District III
2100 Stewart Ave., Ste. 310
Wausau, WI 54401
Phone: (715) 848-1421
Fax: (715) 845-4523

d. District IV
2921 Landmark Place, Ste. 415
Madison, WI 53713-4248
Phone: (608) 266-9250
Fax: (608) 273-5705

3. Court of Appeals Staff Attorneys
2921 Landmark Place, Ste. 415
Madison, WI 53713-4248
Phone (Chief Staff Attorney): (608) 261-8266
Fax: (608) 273-5706

4. Supreme Court Commissioners
110 E. Main St., Ste. 440
Madison, WI 53703-3328
Phone: (608) 266-7442
Fax: (608) 267-0911

Appendix B
Clerks of Circuit Court

The following list sets forth the names, addresses, and phone numbers of the clerks of circuit court.

Adams County
Miranda Christensen
401 Adams St., Ste. 6
Friendship, WI 53934-0220
Phone: (608) 339-4208
Fax: (608) 339-4503

Ashland County
Sandra Paitl
201 W. Main St., Rm. 307
Ashland, WI 54806-1652
Phone: (715) 682-7016
Fax: (715) 682-7919

Barron County
Sharon Millermon
1420 State Hwy. 25 N.,
Rm. 2201

Barron, WI 54812-3006
Phone: (715) 537-6265
Fax: (715) 537-6269

Bayfield County
Diedre Zifko
117 E. Fifth St.
P.O. Box 536
Washburn, WI 54891-0536
Phone: (715) 373-6108
Fax: (715) 373-6317

Brown County
John Vander Leest
100 S. Jefferson St.
P.O. Box 23600
Green Bay, WI 54305-3600
Phone: (920) 448-4155
Fax: (920) 448-4156

Buffalo County
Julie Vollmer
407 S. 2nd St.
P.O. Box 68
Alma, WI 54610
Phone: (608) 685-6212
Fax: (608) 685-6211

Burnett County
Jacqueline Baasch
7410 County Rd. K
#115
Siren, WI 54872
Phone: (715) 349-2147
Fax: (715) 349-7659

Calumet County
LeAnne Karls
206 Court St.
Chilton, WI 53014
Phone: (920) 849-1414
Fax: (920) 849-1483

Chippewa County
Nate Liedl
711 N. Bridge St.
Chippewa Falls, WI 54729
Phone: (715) 726-7758
Fax: (715) 726-7786

Clark County
Heather Bravener
517 Court St., Rm. 405
Neillsville, WI 54456-1904

Phone: (715) 743-5181
Fax: (715) 743-5187

Columbia County
Julie Kayartz
400 DeWitt St.
P.O. Box 587
Portage, WI 53901-0587
Phone: (608) 742-9642
Fax: (608) 742-9601

Crawford County
Nancy Dowling
220 N. Beaumont Rd.
Prairie du Chien, WI 53821
Phone: (608) 326-0209
Fax: (608) 326-0288

Dane County
Carlo Esqueda (through Jan. 26, 2024)
Jeff Okazaki (as of Jan. 29, 2024)
215 S. Hamilton St.
Madison, WI 53703
Phone: (608) 266-4311
Fax: (608) 266-9286

Dodge County
Kelly Enright
Dodge County Justice Facility
210 W. Center St.
Juneau, WI 53039-1091
Phone: (920) 386-3570
Fax: (920) 386-3587

Door County
Connie DeFere
1205 S. Duluth Ave.
Sturgeon Bay, WI 54235
Phone: (920) 746-2205
Fax: (920) 746-2520

Douglas County
Michele Wick
1313 Belknap St., Rm. 309
Superior, WI 54880-2769
Phone: (715) 395-1203
Fax: (715) 395-1581

Dunn County
Katie Schalley
615 Stokke Parkway, Ste. 1300
Menomonie, WI 54751
Phone: (715) 232-2611
Fax: (715) 232-6888

Eau Claire County
Susan Schaffer
721 Oxford Ave.
Eau Claire, WI 54703
Phone: (715) 839-4816
Fax: (715) 839-4817

Florence County
Jessica McCoy
501 Lake Ave.
P.O. Box 410
Florence, WI 54121-0410
Phone: (715) 528-3205
Fax: (715) 528-5470

Fond du Lac County
Michelle Weber
160 S. Macy St., 2nd Floor
Fond du Lac, WI 54935-4241
Phone: (920) 929-3040
Fax: (920) 929-3933

Forest County
Penny Carter
200 E. Madison St.
Crandon, WI 54520-1414
Phone: (715) 478-3323
Fax: (715) 478-3211

Grant County
Tina McDonald
130 W. Maple St.
P.O. Box 110
Lancaster, WI 53813
Phone: (608) 723-2752
Fax: (608) 723-7370

Green County
Melanie Leutenegger
Green County Justice Center
2841 6th St.
Monroe, WI 53566
Phone: (608) 328-9433
Fax: (608) 328-9459

Green Lake County
Amy Thoma
571 County Rd. A
Green Lake, WI 54941-3188
Phone: (920) 294-4145
Fax: (920) 294-4171

Iowa County

Lia Leahy
222 N. Iowa St.
Dodgeville, WI 53533-1548
Phone: (608) 935-0395
Fax: (608) 935-0386

Iron County
Karen Ransanici
300 Taconite St., Ste. 207
Hurley, WI 54534-1546
Phone: (715) 561-4084
Fax: (715) 561-4054

Jackson County
Jean M. Sahr
307 Main St.
Black River Falls, WI 54615-0609
Phone: (715) 284-0208
Fax: (715) 284-0270

Jefferson County
Cindy Hamre Incha
311 S. Center Ave., Rm. 115
Jefferson, WI 53549
Phone: (920) 674-7150
Fax: (920) 674-7425

Juneau County
Alecia Kast
200 Oak St., Justice Center
Mauston, WI 53948
Phone: (608) 847-9356

Kenosha County
Rebecca Matoska-Mentink
912 56th St.
Kenosha, WI 53140
Phone: (262) 653-2664
Fax: (262) 653-2435

Kewaunee County
Rebecca Deterville
613 Dodge St.
Kewaunee, WI 54216-1398
Phone: (920) 388-7144
Fax: (920) 388-7049

La Crosse County
Tammy Pedretti
333 Vine St., Room 1200
La Crosse, WI 54601-3296
Phone: (608) 785-9590
Fax: (608) 789-7821

Lafayette County
Trisha Rowe
626 Main St.
Darlington, WI 53530
Phone: (608) 776-4832
Fax: (608) 776-4845

Langlade County
Tina Wild
800 Clermont St.
Antigo, WI 54409-1985
Phone: (715) 627-6215
Fax: (715) 627-6389

Lincoln County
Thomas Barker
1110 E. Main St.
Merrill, WI 54452-2579
Phone: (715) 536-0319
Fax: (715) 536-0361

Manitowoc County
April Higgins
1010 S. 8th St.
1st Floor, Room 105
Manitowoc, WI 54221-2000
Phone: (920) 683-4030
Fax: (920) 683-2733

Marathon County
Kelly Schremp
500 Forest St.
Wausau, WI 54403-5568
Phone: (715) 261-1300
Fax: (715) 261-1319

Marinette County
Carrie Brazeau
1926 Hall Ave.
Marinette, WI 54143-1717
Phone: (715) 732-7450
Fax: (715) 732-7461

Marquette County
Shari Rudolph
77 W. Park St.
P.O. Box 749
Montello, WI 53949-0749
Phone: (608) 297-3100,
ext. 3005
Fax: (608) 297-9188

Menominee County
Delsy Kakwitch

W3269 Courthouse Lane
P.O. Box 279
Keshena, WI 54135-0279
Phone: (715) 799-3313
Fax: (715) 799-1322

Milwaukee County
Anna Hodges
901 N. 9th St., Rm. 104
Milwaukee, WI 53233
Phone: (414) 278-5362/
(414) 278-4190
Fax: (414) 223-1260

Monroe County
Laura L. Endres
112 S. Court St.
Sparta, WI 54656
Phone: (608) 269-8745
Fax: (608) 269-8781

Oconto County
Trisha LeFebre
301 Washington St.
Oconto, WI 54153-1621
Phone: (920) 834-6857
Fax: (920) 834-6867

Oneida County
Brenda Behrle
1 S. Oneida St.
P.O. Box 400
Rhinelander, WI 54501-0400
Phone: (715) 369-6120
Fax: (715) 369-6160

Outagamie County
Barb Bocik
320 S. Walnut St.
Appleton, WI 54911-5918
Phone: (920) 832-5131
Fax: (920) 832-5115

Ozaukee County
Connie Mueller
1201 S. Spring St.
P.O. Box 994
Port Washington, WI 53074-0994
Phone: (262) 284-8409
Fax: (262) 284-8491

Pepin County
Audrey Lieffring
740 7th Ave. W.

P.O. Box 39
Durand, WI 54736-0039
Phone: (715) 672-8861
Fax: (715) 672-8521

Pierce County
Kerry Feuerhelm
414 W. Main St.
P.O. Box 129
Ellsworth, WI 54011
Phone: (715) 273-6741
Fax: (715) 273-6855

Polk County
Sharon Jorgenson
Polk County Justice Center
1005 W. Main St., Ste. 300
Balsam Lake, WI 54810
Phone: (715) 485-9299
Fax: (715) 500-6525

Portage County
Lisa Roth
1516 Church St.
Stevens Point, WI 54481-3598
Phone: (715) 346-1364
Fax: (715) 346-1236

Price County
Lisa Walcisak
126 Cherry St., Room 206
Phillips, WI 54555-1249
Phone: (715) 339-2353
Fax: (715) 339-5114

Racine County
Amy Vanderhoef
730 Wisconsin Ave.
Racine, WI 53403-1238
Phone: (262) 636-3333
Fax: (262) 636-3341

Richland County
Stacy Kleist
181 W. Seminary St.
P.O. Box 655
Richland Center, WI 53581
Phone: (608) 647-3956
Fax: (608) 647-3911

Rock County
Amanda Nelson
51 S. Main St., 5th Floor
Janesville, WI 53545-3978

Phone: (608) 743-2200
Fax: (608) 743-2223

Rusk County
Lori Gorsegner
311 Miner Ave. E.,
Ste. L350
Ladysmith, WI 54848-1862
Phone: (715) 532-2108
Fax: (715) 532-2110

St. Croix County
Kristi Severson
1101 Carmichael Rd.,
Ste. 2402
Hudson, WI 54016-7710
Phone: (715) 386-4630
Fax: (715) 381-4396

Sauk County
Carrie Wastlick
515 Oak St.
Baraboo, WI 53913-2496
Phone: (608) 355-3287
Fax: (608) 355-3480

Sawyer County
Marjorie Kelsey
10610 Main St., Ste. 244
Hayward, WI 54843-6586
Phone: (715) 634-4887
Fax: (715) 638-3297

Shawano County
Ethan Schmidt
311 N. Main St.
Shawano, WI 54166-2198
Phone: (715) 526-9347
Fax: (715) 526-4915

Sheboygan County
Chris Koenig
615 N. 6th St.
Sheboygan, WI 53081-4692
Phone: (920) 459-3068
Fax: (920) 459-3921

Taylor County
Jill Scheithauer
224 S. Second St.
Medford, WI 54451-1899
Phone: (715) 748-1425
Fax: (715) 748-2465

Trempealeau County

Kari Tidquist
36245 Main St.
P.O. Box 67
Whitehall, WI 54773-0067
Phone: (715) 538-2311, ext. 240
Fax: (715) 538-4400

Vernon County
Sheila Olson
400 Courthouse Square,
Ste. 115
Viroqua, WI 54665
Phone: (608) 637-5340
Fax: (608) 637-5554

Vilas County
Beth Soltow
330 Court St.
Eagle River, WI 54521
Phone: (715) 479-3632
Fax: (715) 479-3636

Walworth County
Michele Jacobs
1800 County Rd. NN
P.O. Box 1001
Elkhorn, WI 53121-1001
Phone: (262) 741-7012
Fax: (262) 741-7050

Washburn County
Shannon Anderson
10 Fourth Ave.
P.O. Box 339
Shell Lake, WI 54871-0339
Phone: (715) 468-4677
Fax: (715) 468-4678

Washington County
Sarah Adjemian
432 E. Washington St.
P.O. Box 1986
West Bend, WI 53095-1986
Phone: (262) 335-4341
Fax: (262) 335-4776

Waukesha County
Monica Paz
515 W. Moreland Blvd.
Waukesha, WI 53188-2428
Phone: (262) 896-8525
Fax: (262) 896-8228

Waupaca County

Yvette Kienert
811 Harding St.
Waupaca, WI 54981
Phone: (715) 258-6460
Fax: (715) 258-6497

Waushara County
Katrina Rasmussen
209 S. St. Marie St.
P.O. Box 508
Wautoma, WI 54982-0508
Phone: (920) 787-0441
Fax: (920) 787-0481

Winnebago County
Tara Berry
415 Jackson Dr.
P.O. Box 2808
Oshkosh, WI 54903-2808
Phone: (920) 236-4848
Fax: (920) 424-7780

Wood County
Kim Stimac
400 Market St.
P.O. Box 8095
Wisconsin Rapids, WI
54495-8095
Phone: (715) 421-8490
Fax: (715) 421-8691

Note: An online directory of the clerks of court is available on the Wisconsin Court System's website, https://www.wicourts.gov/courts/circuit/clerkcontact.htm (updated Dec. 26, 2023). Related contact information for the circuit courts is also available at https://www.wicourts.gov/contact/Circuit_Courts.html (last visited Dec. 26, 2023), and links to various circuit court websites are available at https://www.wicourts.gov/courts/circuit/judges.htm (updated Dec. 8, 2023).

Appendix C
Standards of Appellate Review

Prepared by

Hon. Thomas Hruz

Judge

Wisconsin Court of Appeals, District III

Wausau, Wisconsin

&

Nathan Petrashek

District Staff Attorney

Wisconsin Court of Appeals, District II

Waukesha, Wisconsin

NOTE: This appendix is a revision of "Standards of Review in the Court of Appeals," originally prepared by the Honorable Richard S. Brown, Court of Appeals, District II, and the Honorable Paul C. Gartzke, Court of Appeals, District IV, for the 1980 State Bar of Wisconsin Appellate Practice Seminar. Judge Gartzke prepared updates for this appendix until 1999. Judge Brown assumed responsibility for updates and revisions from 2001 through 2014, and Judge Kitty Brennan, Court of Appeals, District I, updated the appendix in 2015. Judge Thomas Hruz took over that responsibility in 2016 and was joined by District Staff Attorney Nathan Petrashek in 2021.

Standards of Appellate Review

> "Determining the correct standard of review, of course, is something an appellate court does at the very beginning of its work, and it definitively controls how we address questions of both fact and law." *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 32, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion). [1]

I. Introduction

As the above quote suggests, an appellate court's first task when considering an issue is deciding which standard of review it will apply to the circuit court's determination. Lest anyone believe this is a recent development, Justice Shirley Abrahamson, 3 years into her 43-year career on Wisconsin's high court, commented, "One of the first questions I ask at oral argument is what is the proper standard of review for the court." Shirley S. Abrahamson, *Some Thoughts About Appellate Argument*, Wis. Bar Bull., Feb. 1979, at 41, 41.

While identifying the standard of review often involves a straightforward application of statutes, case law, or other authorities, locating the standard of review occasionally proves a vexing challenge. But all attorneys and judges must accept—even embrace—the task because the standard of review often determines the outcome of the appellate proceeding. The standard of review is the lens through which the appellate tribunal will view the legal and factual issues presented.

Trial counsel should know the standard of appellate review on each key issue to be tried, as well as the efforts necessary to ensure that any claims of error can be heard by the appellate court. By explaining the standard of review to the circuit court, trial counsel can alert the circuit court to the proper procedure necessary to decide the issue and thus will help the circuit court avoid error (e.g., to make required factual findings, to properly exercise its discretion, and to appropriately restrict its review of a municipal decision). And a trial attorney who bears the standard of review in mind at all times will have no trouble making a record of any alleged error so as to preserve it for review. Conversely, a trial attorney who ignores the standard of review does so at the client's peril, because appellate counsel's options can end up being foreclosed by trial counsel's failures.

The circuit court should know the standard of appellate review and the need for a proper record for the context of such a review. Bearing the standard of review in mind will allow the court to explain its rationale and make the necessary findings in a manner that is more likely to withstand appellate scrutiny. Moreover, when reviewing the decision of an administrative agency or a municipality, the circuit court itself acts as an appellate court and must know and apply the appropriate standards.

Because the standard of review provides the framework for the appellate court's task, appellate counsel must anticipate the court's needs and clearly state the appropriate standard of review in the appellate brief. If there are multiple issues, appellate counsel should state the standard of review at the beginning of each argument and then apply it. Knowing the appropriate standard helps counsel predict the likelihood of success on appeal and is therefore key to properly advising clients considering pursuing appellate proceedings and prioritizing issues to raise on appeal.

Adherence to the foregoing protocols clarifies the scope of review for the appellate courts or—if there is disagreement as to the applicable standard of review—permits an appellate court to make a threshold determination of which standard applies. Proper identification of the standard of review by trial counsel, the circuit court, and appellate counsel helps the appellate court approach the record and briefs and supports economy of judicial effort (a laudable goal, as any attorney who has waited a year or more for an appellate court decision will certainly attest). The appellate court's interest in applying the correct standard of review is in reaching a legally sound determination and insulating the appellate court from error.

This appendix is designed to help attorneys and judges locate and understand the standards of review that they may need to refer to during typical litigation in Wisconsin. The appendix does not endeavor to provide an exhaustive review of the standards applicable to every type of issue; this effort would be not only overly burdensome but also folly, because standards of review can be found scattered throughout the Wisconsin Statutes, buried in case law, or even implied in the Wisconsin Constitution. Rather, the goal of this appendix is to provide all interested parties with the tools needed to identify the standard of review that controls the issue and to comprehend how that standard will frame the appellate court's task.

This appendix is organized in the following fashion. Part II sketches out what a standard of review is and is not; it also includes working definitions for the most common standards of review. Part III identifies some common authorities that articulate standards of review, as well as many helpful examples. Part IV contains a brief overview of the main standards of review, including working definitions and a discussion of classification. Parts V, VI, and VII contain detailed descriptions of the three general classifications of appellate court scrutiny: findings of fact, conclusions of law, and discretionary determinations. Part VIII, titled "Negative Standards of Review," discusses the many rules and doctrines under which an appellate court may decline to hear an issue. The remaining parts touch upon particular considerations that affect appellate court review of alleged error.

II. Working Definitions and Scope

A standard of review is the lens through which the appellate court will view the circuit court's decisions at issue in the appeal. Among other things, that lens defines the extent to which the court will

1. Deal with an issue,
2. Examine the correctness of factual findings by the trier of fact,
3. Examine the correctness of the circuit court's application of the law to the facts found, and
4. Examine the appropriateness of a discretionary act by the circuit court.

A scope of review is a statement of the type of review applicable to a specific decision or determination. "Scope of review" and "standard of review" are often used interchangeably. Although the Wisconsin Rules of Appellate Procedure only implicitly contemplate that briefs include a scope-of-review statement, *see* Wis. Stat. § 809.19(1), as a practical matter every brief-in-chief should include this information. Additionally, the docketing statement required in appeals must state the proper standard of review to be applied for each issue to be raised. Wis. Ct. App. Internal Operating Procs. VII(2)(b) (Nov. 30, 2009), https://www.wicourts.gov/ca/IOPCA.pdf; *see* Form AP-027.

For purposes of this appendix, "appellate counsel" means the attorney representing a party pursuing or contemplating an appeal of a circuit court's determination. The attorney representing a party in proceedings before the circuit court is referred to as "trial counsel." Parties often retain their trial counsel as appellate counsel, but use of the two terms is important to this appendix to distinguish between proceedings before the trial court and proceedings before the appellate court.

This outline deals only with generalized standards of review. It does not provide scopes of review on specific issues except for purposes of illustration. However, this appendix does endeavor to include a detailed description of the primary standards of review, which attorneys and judges may find useful to consult when applying a particular standard. In all cases, counsel should review the relevant statutes and case law to locate the applicable standard of review or to craft an argument as to what the standard of review should be if none exists or it is debatable which standard should apply.

A circuit court can act as an appellate court, for example, when the circuit court reviews the decision of an administrative agency or municipal body. When acting as an appellate court, a circuit court generally applies the same standards of review used by the court of appeals and the supreme court.

III. Sources of Standards of Review

A. Generally

The applicable standard of review can be inferred from a number of sources. These sources include the state constitution, statutory enactments, and interpreting case law. When a client is considering an appeal, counsel should spend some time thinking about the nature of the case and the possible sources of law from which the applicable standards of review might be derived. Locating the pertinent standard or standards of review is the first step to providing strategic guidance and preparing a persuasive appellate brief.

B. Wisconsin Constitution

The Wisconsin Constitution functions as a grant of judicial authority, though as a necessary corollary it also constrains the exercise of that authority to within the scope of that grant. As a practical matter, the state constitution restricts the types of issues or cases a particular court may entertain.

This duality was on display in *State ex rel. Universal Processing Services of Wisconsin, LLC v. Circuit Court of Milwaukee County*, 2017 WI 26, 374 Wis. 2d 26, 892 N.W.2d 267. The circuit court entered an order appointing a referee in complex business litigation; the referee was given authority to "hear and decide all motions filed, whether discovery or dispositive, subject to review under the standard of erroneous exercise of discretion." *Id.* ¶ 77. The supreme court, in supervisory writ proceedings, concluded the order impermissibly delegated the constitutional "judicial power" to the referee because the circuit court had constrained its own authority to freely reject the referee's "rulings." *Id.* Relatedly, the supreme court concluded that the circuit court's decision to constrain the scope of its review of the referee's rulings using the "erroneous exercise of discretion" standard contravened the constitutional grant of circuit court authority, the statutes enacted defining the scope of that authority, "and rules regarding circuit court and appellate court authority and practice." *Id.* ¶ 88.

Many cases discuss the scope of constitutional judicial authority applicable to a particular court, and attorneys should make sure their request for relief is something the court is capable of doing. For example, "[t]he court of appeals is by Constitution limited to appellate jurisdiction. This precludes it from making any factual determinations where the evidence is in dispute." *Gottsacker v. Monnier*, 2005 WI 69, ¶ 35, 281 Wis. 2d 361, 697 N.W.2d 436 (citations omitted).

C. Supreme Court and Court of Appeals Functions

Relatedly, the scope of review is dictated in some ways by the discrete functions of the Wisconsin Supreme Court and the Wisconsin Court of Appeals. "The court of appeals is intended to be a high-volume, error-correcting court, having a close relationship to the circuit courts in respect to the superintending control of circuit court functions." *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986). By contrast, the supreme court "is intended to make final determinations affecting state law, to supervise the development of the common law, and to assure uniformity of precedent throughout the state." *Id.* These different functions are implicit in the constitutional structure. *Id.*

The different functions of the supreme court and the court of appeals are such that the supreme court might find that unobjected-to errors go to the integrity of the fact-finding process and therefore are properly reviewed by that court, but the court of appeals lacks that power of review. *State v. Schumacher*, 144 Wis. 2d 388, 409–10, 424 N.W.2d 672 (1988).

Note. The court of appeals and the supreme court have identical discretionary power to order new trials on the basis of unobjected-to errors under Wis. Stat. §§ 752.35 and 751.06, respectively. *See Vollmer v. Luety*, 156 Wis. 2d 1, 13, 456 N.W.2d 797 (1990).

The court of appeals, like the supreme court, has a law-defining and development function, but because it is a unitary court (i.e., not four separate courts), and because litigants, lawyers, and circuit courts should be able to rely on its precedents, the court of appeals cannot overrule, modify, or withdraw language from one of its own previously published decisions. *Cook v. Cook*, 208 Wis. 2d 166, 188–90, 560 N.W.2d 246 (1997).

D. Statutes

1. Generally

Countless statutory provisions can be regarded as affecting the standard of review applicable to a particular issue. While some statutes—such as those pertaining to administrative or certiorari review—affirmatively set forth standards against which to measure the action of the inferior tribunal, many statutes provide what are referred to as "negative" standards of review—constraints on a court's ability to decide particular issues, frequently in the form of provisions conditioning review upon the occurrence of some event (such as a contemporaneous objection or offer of proof). In all circumstances, it is advisable for courts and counsel to review the statutes pertaining to the type of proceeding under consideration.

2. Judicial Hearings (a sampling)

As might be expected, the considerable number of statutes that govern civil and criminal procedure often dictate whether and under what conditions particular issues can be raised on appeal. Commonly used statutes include the following:

Wis. Stat. § 805.11(1)—a party must object before a ruling or order is made to avoid waiving error.

Wis. Stat. § 901.03(1)(a) and (b)—a party must object to the admission of evidence or move to strike, and a party must make an offer of proof if evidence excluded (unless nature of evidence is apparent).

Wis. Stat. § 805.13(3)—failure to object at instruction conference forfeits any error in proposed instructions or verdict. *See also infra* VIII.K.2.g.

Wis. Stat. § 805.13(4)—failure to object to a material variance or omission between instructions given and instructions proposed does not forfeit error.

Wis. Stat. § 805.15(5)—if the circuit court denies a motion for judgment notwithstanding the verdict, to change answer, or for directed verdict, the respondent may assert for the first time on appeal grounds that entitle that party to a new trial if the appellate court concludes that the circuit court erred in denying the motion.

Wis. Stat. § 805.17(4)—in actions tried by the court without a jury, sufficiency of evidence to support the findings may be raised on appeal regardless of whether the party raising the question has objected in the trial court to such a finding or moved for new trial.

Wis. Stat. § 805.18(1)—the court shall, "in every stage of an action," disregard any error or defect "which shall not affect the substantial rights of the adverse party."

Wis. Stat. §§ 751.06, 752.35 (discretionary reversal)—the supreme court or the court of appeals may reverse the judgment or order appealed from if the real controversy was not fully tried or if it is probable that justice has miscarried.

Wis. Stat. § 971.31(10)—an order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint. For a helpful discussion of the history and

import of this subsection, *see State v. Abbott*, 2020 WI App 25, ¶¶ 40–48, 392 Wis. 2d 232, 944 N.W.2d 8 (noting that the harmless-error test applies in Wis. Stat. § 971.31(10) appeals).

Wis. Stat. § 974.02(2)—an appellant need not file a postconviction motion in the circuit court before an appeal if the grounds are sufficiency of the evidence or issues previously raised.

Wis. Stat. § 974.06(4)—grounds adjudicated or not raised, or waived, that resulted in conviction or sentence cannot be the basis for a subsequent motion for postconviction relief unless there is "sufficient reason" for the failure to earlier assert those grounds.

3. Administrative Agencies

a. Generally

The statutory provisions pertaining to review of administrative agency decisions bear special scrutiny. Wis. Stat. ch. 227 is a detailed framework for judicial review of agency decision-making in adversarial cases. "The right to judicial review of an agency's decision is entirely statutory, and such decisions are not reviewable unless made so by statute." *Madison Landfills, Inc. v. DNR*, 180 Wis. 2d 129, 138, 509 N.W.2d 300 (Ct. App. 1993) (citing *Wisconsin's Env't Decade, Inc. v. Public Serv. Comm'n of Wis.*, 93 Wis. 2d 650, 657, 287 N.W.2d 737 (1980)).

b. Exclusivity of Statutory Review

If the statutory method of review is comprehensive, then the civil rules of procedure are inapplicable. *See Wagner v. Medical Examining Bd.*, 181 Wis. 2d 633, 639, 511 N.W.2d 874 (1994) (stating rule that Wis. Stat. ch. 227 trumps rules of civil procedure when they conflict).

Limited exceptions to exclusivity rule:

A party can seek judicial relief by a method other than that prescribed by statute when the statutory remedy is inadequate. *Hermann v. Town of Delavan*, 215 Wis. 2d 370, 383–84, 572 N.W.2d 855 (1998). The exclusivity rule is a matter of policy, convenience, and discretion, not jurisdiction. *Id.* at 383.

An alternative method for review of agency decision is by writ, usually certiorari. *See State ex rel. Iushewitz v. Milwaukee Cnty. Pers. Rev. Bd.*, 176 Wis. 2d 706, 709–10, 500 N.W.2d 634 (1993). See Wis. Const. art. VII, §§ 3(2) and 5(3) for powers of the supreme court and court of appeals to issue writs.

c. Wis. Stat. ch. 227—Administrative Review Generally

The scope of circuit court review and appellate court review of agency decision-making is identical under Wis. Stat. § 227.57. *See St. Paul Ramsey Med. Ctr. v. Department of Health & Soc. Servs.*, 186 Wis. 2d 37, 43, 519 N.W.2d 681 (Ct. App. 1994). Appellate courts review the decision of the agency, not the decision of the circuit court. *Id.*

See Wis. Stat. § 227.57, titled "Scope of Review," for several standards of review:

Subsec. (1)—Review generally confined to the record.

Subsec. (4)—The court must remand if the fairness of the proceeding or the correctness of the action has been "impaired by a material error in procedure or a failure to follow prescribed procedure."

Subsec. (5)—The court must set aside or modify an agency action if the agency erroneously interpreted a law and a correct interpretation compels a particular action, or remand.

Subsec. (6)—The court must not substitute its judgment for an agency's in a contested case as to the weight of evidence on any disputed finding of fact. The court must set aside the agency action or remand the case if the agency's action depends on any finding

of fact "that is not supported by substantial evidence in the record."

Subsec. (8)—The court must reverse or remand if an exercise of discretion is outside the range of discretion delegated to the agency; is inconsistent with an agency rule, policy, or prior practice, unless the deviation is explained; or violates statutes or a constitutional provision, "but the court shall not substitute its judgment for that of the agency on an issue of discretion."

Subsec. (10)—"[D]ue weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it."

Subsec. (11)—"Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law." Wis. Stat. § 227.57(11).

d. Notable Exceptions to Wis. Stat. § 227.57 Review [see Wis. Stat. § 227.03]

(1) Worker's compensation—Wis. Stat. § 102.23(1)(e). A Labor and Industry Review Commission (LIRC) decision can be set aside only if LIRC acted without or in excess of its powers, if the order or award was procured by fraud, or if the findings of fact do not support order or award. Appellate review is provided for by Wis. Stat. § 102.25.

(2) Unemployment insurance—Wis. Stat. § 108.09(7)(b). "Any judicial review under this chapter shall be confined to questions of law…." Findings are conclusive if supported by any credible evidence. *See Universal Foundry Co. v. Department of Indus., Lab. & Hum. Rels.*, 86 Wis. 2d 582, 588–89, 273 N.W.2d 324 (1979).

(3) Proceedings involving the revocation of community supervision or aftercare supervision under Wis. Stat. § 938.357(5); the revocation of parole, extended supervision, or probation; the grant of probation; prison discipline; mandatory release; or any other proceeding involving the care and treatment of a resident or inmate of a correctional institution. Wis. Stat. § 227.03(4). Review is by certiorari. *See also State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 522–23, 563 N.W.2d 883 (1997) (noting that habeas corpus may also be proper in certain situations).

4. Statutory Certiorari Review

Many statutes explicitly provide for certiorari review of local government decision-making.

Examples:

- Wis. Stat. § 70.47(13)—appeal to circuit court from determination of a board of review.
- Wis. Stat. § 62.23(6)(g) and (7)(e)10.—city zoning board of appeals; *see also* Wis. Stat. § 781.10 (providing for accelerated certiorari review of permits related to residential development).
- Wis. Stat. § 59.694(10)(a)—boards of adjustments; circuit court may take additional evidence if "necessary." *See also* Wis. Stat. § 781.10(2)(d)2., 4. (providing that, in certiorari review of permits related to residential development, the court can allow parties to supplement the record or the court can order additional proceedings before the appropriate decision-making political subdivision).
- Wis. Stat. § 125.12(2)—liquor licensing decisions under Wis. Stat. § 125.12(2)(d). *Nowell v. City of Wausau*, 2013 WI 88, ¶ 48, 351 Wis. 2d 1, 838 N.W.2d 852.

On certiorari review, the scope of appellate review is same as circuit court's, unless the circuit court takes additional evidence. *State v. Outagamie Cnty. Bd. of Adjustment,* 2001 WI 78, ¶ 26, 244 Wis. 2d 613, 628 N.W.2d 376. The taking of additional evidence is authorized under certain certiorari provisions. *See, e.g.*, Wis. Stat. § 62.23(7)(e)10.a.

If circuit court does not take evidence, the scope of review is limited to the record and includes the agency's jurisdiction, theory of law, whether action was arbitrary, and whether evidence was such that order could reasonably be made. *See Outagamie Cnty. Bd. of Adjustment*, 2001 WI 78, ¶ 26, 244 Wis. 2d 613.

E. Case Law

1. In General

The case law establishes the standards of review for many issues by categorizing the issue as one of fact, law, or discretion. Such case law is often the primary means by which courts definitively establish the appropriate standard of review.

Examples:

- The circuit court's evidentiary rulings are discretionary determinations. *Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698.

- Whether there are sufficient facts to warrant the circuit court's jury instruction and whether the instruction correctly states the law are questions of law. *State v. Stietz*, 2017 WI 58, ¶ 14, 375 Wis. 2d 572, 895 N.W.2d 796, *Weborg v. Jenny*, 2012 WI 67, ¶ 42, 341 Wis. 2d 668, 816 N.W.2d 191.

- The construction of an unambiguous contract is a question of law, but if the contract is ambiguous, the intention of the parties is a question of fact. *Insurance Co. of N. Am. v. DEC Int'l, Inc.*, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998).

- Evidentiary or historical findings are factual, but findings of "constitutional fact," such as whether a confession was voluntary, are issues of law. *See State v. Hajicek*, 2001 WI 3, ¶¶ 14–15 & n.3, 240 Wis. 2d 349, 620 N.W.2d 781.

Regardless of how the issue under review is categorized, if the issue has already been decided by an appellate court in a specific case, the law-of-the-case doctrine requires that the prior decision be followed in all subsequent proceedings in the circuit court or on appeal. *Laatsch v. Derzon (In re Est. of Derzon)*, 2018 WI App 10, ¶ 40, 380 Wis. 2d 108, 908 N.W.2d 471. This rule is not absolute; for example, a contrary decision on the same point of law from a controlling authority may provide grounds to revisit the issue. *State v. Jensen*, 2021 WI 27, ¶ 13, 396 Wis. 2d 196, 957 N.W.2d 244, *cert. denied*, 142 S. Ct. 1187 (2022).

Note. For the benefit of the reader, this appendix provides dual case names for certain cases that have previously tended to be alternatively cited with adversarial party names or with single party names following a procedural phrase (e.g., *In re Paternity of Baby Doe*). *See The Bluebook: A Uniform System of Citation* R. 10.2.1(a), at 98 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). However, the Wisconsin Supreme Court and Court of Appeals adhere to the rule of using adversarial parties' names in case citations.

2. Equity

Decisions made in equity will be reviewed for erroneous exercise of discretion. *Anderson v. Onsager*, 155 Wis. 2d 504, 510–14, 455 N.W.2d 885 (1990) (specific performance); *Consumer's Co-op of Walworth Cnty. v. Olsen*, 142 Wis. 2d 465, 472, 419 N.W.2d 211 (1988) (piercing corporate veil); *Singer v. Jones*, 173 Wis. 2d 191, 194–96, 496 N.W.2d 156 (Ct. App. 1992) (constructive trust). It may be error for an appellate court to impose an equitable remedy without the circuit court having first been given the opportunity to ascertain the relevant facts. *See Pulkkila v. Pulkkila*, 2020 WI 34, ¶¶ 31–37, 391 Wis. 2d 107, 941 N.W.2d 239.

3. Writs

a. Habeas Corpus

"When considering whether or not to grant habeas corpus review, the habeas court determines only whether the order resulting in the restraint of liberty was made in violation of the constitution, or whether the court which issued the order lacked the jurisdiction

or legal authority to do so." *State ex rel. Hager v. Marten*, 226 Wis. 2d 687, 693, 594 N.W.2d 791 (1999).

Ineffective assistance of appellate counsel in a criminal appeal is reviewable only by habeas brought in the court of appeals or supreme court. *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). The court of appeals "need not entertain a petition for a writ of habeas corpus which raises a claim of ineffective postconviction counsel," *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 683–84, 556 N.W.2d 136 (Ct. App. 1996) (emphasis added), unless the petition seeks relief that may be obtained only in the court of appeals, *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 3, 354 Wis. 2d 626, 347 N.W.2d 805 (holding that court of appeals is the proper forum for a habeas petition that seeks extension of the time to file a notice of postconviction relief because such an extension may be granted only by the court of appeals). In *State ex rel. Warren v. Meisner*, 2020 WI 55, ¶ 36, 392 Wis. 2d 1, 944 N.W.2d 588, the supreme court clarified that because the distinction between "postconviction" counsel and "appellate" counsel is not always clear, petitions alleging ineffectiveness should be filed with the court in which the alleged ineffectiveness occurred.

The writ of habeas corpus will not be heard "if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention." Wis. Stat. § 974.06(8).

Additionally, the writ may be barred by the doctrine of laches, the application of which is reviewed using a mixed standard whereby the existence of the three elements necessary to the laches defense presents a question of law, but the circuit court's ultimate determination whether to apply laches is discretionary. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶¶ 15–16, 389 Wis. 2d 516, 936 N.W.2d 587.

b. Supervisory (Mandamus and Prohibition)

The court of appeals has "no original jurisdiction other than by prerogative writ." Wis. Const. art. VII, § 5(3); *Cook v. Cook*, 208 Wis. 2d 166, 185 & n.15, 560 N.W.2d 246 (1997). The court usually tolerates petitions for "supervisory writ" because the court "may issue all writs in aid of its jurisdiction and shall have supervisory authority over all actions and proceedings in the courts in the district," Wis. Const. art. VII, § 5(3), if a prerogative writ reasonably covers the request.

A supervisory writ is "a blending of the writ of mandamus and the writ of prohibition," which "serves a narrow function: to provide for the direct control of lower courts, judges, and other judicial officers who fail to fulfill non-discretionary duties, causing harm that cannot be remedied through the appellate review process." *State ex rel. DNR v. Wisconsin Ct. of Appeals*, 2018 WI 25, ¶ 8, 380 Wis. 2d 354, 909 N.W.2d 114 (citations omitted). As the Wisconsin Supreme Court noted in *State ex rel. CityDeck Landing LLC v. Circuit Court for Brown County*, 2019 WI 15, ¶ 5, 385 Wis. 2d 516, 922 N.W.2d 832, "Wisconsin cases contain inconsistencies regarding writ procedure, terminology, and the standards applicable to the exercise of our constitutional superintending authority." That decision contains an extensive discussion of the history of writ procedure in Wisconsin, in an apparent effort to clarify the use of such writs going forward.

As a practical matter, the supervisory writ is the procedural mechanism most frequently requested for having the court of appeals and the supreme court exercise their supervisory authority or superintending authority. The party seeking issuance of a supervisory writ must establish four factors: (1) the court had a plain duty and either acted or intends to act in violation of that duty; (2) an appeal is an inadequate remedy; (3) grave hardship or irreparable harm will result; and (4) the party requested relief promptly and speedily. *Id.* ¶ 30.

The writ of prohibition and the writ of mandamus continue to be recognized at law. The newer "supervisory writ" is both (1) the general term used in petitioning the court of appeals to exercise its constitutional supervisory authority and in petitioning the supreme court to exercise its constitutional superintending authority; and (2) a writ devised independent of the traditional common-law writs. *Id.* ¶ 26. For additional reading on supervisory writs (prohibition and mandamus), see generally chapter 10, *supra*.

c. Writ Directed to Administrative Agency

The court of appeals lacks jurisdiction to entertain an original action to issue a writ to an administrative agency. *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 97, 394 N.W.2d 732 (1986).

Note, however, that the court of appeals may, through supervisory authority over lower courts, exercise original jurisdiction to review a circuit court chief judge's ruling on a judicial-substitution request, *see State ex rel. James L.J. v. Circuit Ct. for Walworth Cnty.*, 200 Wis. 2d 496, 501–04, 546 N.W.2d 460 (1996), or to issue a writ to a John Doe judge, *State ex rel. Unnamed Person No. 1 v. State (In re John Doe Proc.)*, 2003 WI 30, ¶ 75, 260 Wis. 2d 653, 660 N.W.2d 260.

4. Common-Law Certiorari

"It is well established in this state that where there are no statutory provisions for judicial review, the action of a board or commission may be reviewed by way of certiorari." *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 70, 382 Wis. 2d 1, 913 N.W.2d 131.

Common-law certiorari is a discretionary remedy. *State ex rel. Britt v. Gamble*, 2002 WI App 238, ¶ 15 n.4, 257 Wis. 2d 689, 653 N.W.2d 143 (stating that statutory certiorari is a right, while common-law certiorari is discretionary). The petitioner must convince the court that an error occurred that caused substantial harm and that the petitioner is not barred by laches. *State ex rel. Sahagian v. Young*, 141 Wis. 2d 495, 501, 415 N.W.2d 568 (Ct. App. 1987); *see also Collins v. Policano*, 231 Wis. 2d 420, 438, 605 N.W.2d 260 (Ct. App. 1999) (holding that petition was barred by laches).

For distinctions between statutory and common-law certiorari, *see Nowell v. City of Wausau*, 2013 WI 88, ¶ 30, 351 Wis. 2d 1, 838 N.W.2d 852; *Browndale International, Ltd. v. Board of Adjustment*, 60 Wis. 2d 182, 197–99, 208 N.W.2d 121 (1973); and *Britt*, 2002 WI App 238, ¶ 15 n.4, 257 Wis. 2d 689.

Under the common-law-certiorari standard of review, review is limited to "(1) whether the board kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order [or] determination in question." *Town of Delafield v. Winkelman*, 2004 WI 17, ¶ 20 n.4, 269 Wis. 2d 109, 675 N.W.2d 470.

"An agency must follow its own procedural rules, and we will review on certiorari a claim that it has not done so." *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 393, 585 N.W.2d 640 (Ct. App. 1998).

Unless the legislature has prescribed some other method of review, the court may review administrative agency determinations by certiorari. *State ex rel. Iushewitz v. Milwaukee Cnty. Pers. Rev. Bd.*, 176 Wis. 2d 706, 710, 500 N.W.2d 634 (1993) (holding that certiorari must be used to review commission or board decision when no statutory remedy prescribed).

5. Injunction

The injunction is a preventive order looking to the future conduct of the parties. *Western Supply Co. v. T.V. Appliance Mart, Inc.*, 146 Wis. 2d 216, 220, 430 N.W.2d 720 (Ct. App. 1988) (stating that purpose of injunctions is to prevent, not to compensate for damages; injunctions look to the future rather than the past). "To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff. To invoke the remedy [of injunction] the plaintiff must moreover establish that the injury is irreparable, i.e.[,] not adequately compensable in damages. Finally, injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction." *Id.* at 224 (citation omitted).

6. Summary Judgment

Summary judgment is governed by Wis. Stat. § 802.08. The supreme court has established a methodology for all courts, circuit and appellate, to follow when deciding or reviewing a decision on a summary-judgment motion. Whether the lower court correctly applied the methodology presents a question of law—i.e., the reviewing court will simply reapply the methodology to determine whether the lower court reached the correct outcome. *See Preloznik v. City of Madison (In re Cherokee Park Plat)*, 113 Wis. 2d 112, 115–16, 334 N.W.2d 580 (Ct. App. 1983).

The methodology requires the court first to examine the pleadings to determine whether claims have been stated and a material factual issue exists for resolution. *Id.* at 116. If the pleadings demonstrate the existence of a valid claim and the existence of factual

issues, the court examines the moving party's affidavits and other proof for admissible evidence to determine whether that party has made a prima facie case for summary judgment. *Id.* If the moving party is the defendant, he or she must establish a defense that would defeat the plaintiff's claim. *Id.* If the moving party has made a prima facie case for summary judgment, the court must analyze the opposing party's evidentiary submissions to determine whether a genuine issue exists as to any material fact, or whether reasonable conflicting inferences may be drawn from the undisputed facts, thereby necessitating a trial. *Id.*

Courts are prohibited from determining facts when deciding a motion for summary judgment. *Id.* Courts may only determine whether a factual issue exists, and all doubts in that regard are resolved against the party moving for summary judgment (i.e., in favor of a trial). *Id.* A mere allegation of a factual dispute, however, will not defeat an otherwise properly supported summary-judgment motion. *North Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶ 22, 377 Wis. 2d 496, 898 N.W.2d 741. A party opposing summary judgment cannot rely on "unsubstantiated conclusory remarks, speculation, or testimony that is not based [on] personal knowledge." *Id.*

From a procedural standpoint, parties often will file motions raising the same general arguments at various points in the litigation process or will argue in the alternative for different forms of relief based on the state of the record at the time. This can produce confusion about which determination is being reviewed and, consequently, which standard of review should apply. For example, when a circuit court referred to a motion as one for "Summary Judgment, or in the alternative, Directed Verdict," the court of appeals concluded it would review the circuit court's decision as one for a directed verdict when the court did not cite any evidence outside the trial record. *Emer's Camper Corral, LLC v. Alderman*, 2019 WI App 17, ¶¶ 12–13, 386 Wis. 2d 592, 928 N.W.2d 641, *aff'd*, 2020 WI 46, 391 Wis. 2d 674, 943 N.W.2d 513.

F. Treatises

1. 6A *Callaghan's Wisconsin Pleading and Practice* ch. 54 (5th ed.), Westlaw (database updated June 2023) (Scope of Appellate Review).

2. Kristin E. Hickman & Richard J. Pierce, Jr., *Administrative Law Treatise* chs. 10, 11 (6th ed. 2019 & Supp. 2023) (Judicial Review of Adjudicative Fact Finding and Judicial Review and Reasoned Decisionmaking), and 3 *id.* ch. 19 (Discretion and Reviewability).

3. Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* (4th ed. 2010 & Supp. 2022) (3 volumes).

G. Articles

1. For a proposal "that appellate courts reject their long-standing reliance upon the three conventional labels in favor of an analysis which affords deference to lower tribunals where they were in a better position to address a question than the appellate court would be," see Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 Marq. L. Rev. 231, 231 (1991).

a. Under the better-position analysis, deference paid to the trial court's resolution of ambiguity in a proffered judgment is based on the judge's experience of trial or prior experience with the record. *Estate of Schultz v. Schultz*, 194 Wis. 2d 799, 807–09, 535 N.W.2d 116 (Ct. App. 1995).

b. The better-position rationale also pertains to factual events during trial, such as the effect of improper attorney conduct when it forms the basis of a mistrial request, *State v. Bunch*, 191 Wis. 2d 501, 510–11, 529 N.W.2d 923 (Ct. App. 1995), and allegations of juror bias, *State v. Lepsch*, 2017 WI 27, ¶ 22, 374 Wis. 2d 98, 892 N.W.2d 682.

2. See Jeff Leavell, *Appellate Review: Choosing and Shaping the Proper Standard*, Wis. Bar Bull., Apr. 1987, at 14, for a short article emphasizing the importance of knowing scope-of-review principles.

3. Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas, The Fairchild Lecture*, 1994 Wis. L. Rev. 9, 10 ("[W]e are preoccupied with applying the proper 'standard of review,' a technique which permits the appellate court to tolerate a large margin of error in the trial court without ever making a close examination of the trial court's ruling.").

IV. Question of Fact and Law; Ultimate Facts; Mixed Fact and Law; Discretion—Generally—Definitions

A. General Standards of Appellate Review

1. Overview

In general, reviewing courts will classify the actions of an inferior tribunal into one of three categories, each with a corresponding standard of review: (1) findings of fact, (2) conclusions of law, and (3) discretionary determinations. Those standards of review are set forth below.

2. Findings of Fact

Findings of fact by a trial court shall not be set aside on appeal "unless clearly erroneous." Wis. Stat. § 805.17(2). A factual finding is clearly erroneous if it goes against the great weight and clear preponderance of the evidence. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 39, 319 Wis. 2d 1, 768 N.W.2d 615.

A jury verdict will be sustained on appeal if "any credible evidence" supports it. *Morden v. Continental AG*, 2000 WI 51, ¶ 38, 235 Wis. 2d 325, 611 N.W.2d 659. "Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding." *Id.* The standard of review is even more stringent when the circuit court has upheld the jury's findings on motions after verdict. *Dakter v. Cavallino*, 2014 WI App 112, ¶ 18, 358 Wis. 2d 434, 856 N.W.2d 523, *aff'd on other grounds*, 2015 WI 67, 363 Wis. 2d 738, 866 N.W.2d 656.

3. Conclusions of Law

"An appellate court is not bound by a trial court's conclusions of law and decides the matter de novo." *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).

4. Mixed Fact and Law

An appellate court must separate the factual determinations from the conclusions of law and apply the appropriate standard of review to each part. *See Peplinski v. Fobe's Roofing, Inc.*, 193 Wis. 2d 6, 19, 531 N.W.2d 597 (1995).

5. Discretion

The exercise of discretion is fundamental to the trial court's ability to fulfill its role in the legal system. *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶ 11, 305 Wis. 2d 658, 741 N.W.2d 256. An appellate court will sustain a discretionary act if the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Gaugert v. Duve*, 2001 WI 83, ¶ 44, 244 Wis. 2d 691, 628 N.W.2d 861.

Correct terminology is whether the circuit court "erroneously exercised" its discretion rather than "abused" its discretion, but the substance of the standard of review is the same. *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

6. Classification Is Question of Law

Whether an issue is one of fact or one of law (or presumably discretion) is itself a question of law. *See State v. Byrge*, 2000 WI 101, ¶ 32, 237 Wis. 2d 197, 614 N.W.2d 477.

7. Caveat—Classification May Turn on Other Factors

Whether an issue is law, fact, or mixed fact and law sometimes turns on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. *Miller v. Fenton*, 474

U.S. 104, 114 (1985); *see also Pierce v. Underwood*, 487 U.S. 552, 559–60 (1988) (quoting *Miller*, 474 U.S. at 114).

B. Working Definitions

1. Findings of Fact

"The Court has long noted the difficulty of distinguishing between legal and factual issues." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990).

"[A] finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." James T. Haferman, Comment, *Judicial Review of Workmen's Compensation Cases*, 1973 Wis. L. Rev. 576, 579 (quoting L. Jaffe, *Judicial Control of Administrative Action* 548 (1965)).

Evidentiary or historical facts are "facts which are necessary for determination of the ultimate facts; they are the premises upon which conclusions of ultimate facts are based." *State v. Martwick*, 2000 WI 5, ¶ 16, 231 Wis. 2d 801, 604 N.W.2d 552 (quoting *Black's Law Dictionary* 557 (6th ed. 1990)).

"The distinction between propositions of fact and conclusions of law is this: Propositions of fact are descriptive; conclusions of law are dispositive. Propositions of fact state history; conclusions of law assign legal significance to that history." Clarence Morris, *Law and Fact*, 55 Harv. L. Rev. 1303, 1329 (1942).

Example. Whether an encumbrance on land is substantial is a question of fact. *See First Am. Title Ins. Co. v. Dahlmann*, 2006 WI 65, ¶¶ 2, 21, 291 Wis. 2d 156, 715 N.W.2d 609. Degree of encumbrance is descriptive. *But see State v. Payano-Roman*, 2006 WI 47, ¶ 24, 290 Wis. 2d 380, 714 N.W.2d 548, holding that whether a search is a governmental search or a private search presents a question of law. Arguably, however, a determination about the nature of a search seems mostly descriptive. Thus, some cases might present an opportunity for counsel to argue whether a more or a less deferential standard of review is appropriate.

2. Conclusions of Law

"When there is but one account of what happened, and the application of acceptable rules of law to that account is problematical, a question of law results." Morris, *supra* IV.B.1., at 1314–15 (citing Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443 (1899)).

"A conclusion of law results when legal effects are assigned to events. A conclusion of law stands for more than the happening of events; it is at least a step in the legal disposal of events. If a rule of law must be applied before a conclusion is reached, that conclusion is one of law." *Id.* at 1328–29.

"A finding of fact, ultimate or evidentiary, must still in its essential nature be a fact. A conclusion of law goes farther and accepts the facts, ultimate and evidentiary, and by judicial reasoning results from the application of rules or concepts of law to those facts, whether the facts are undisputed or not." *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 179, 212 N.W.2d 97 (1973); *see also Megal v. Green Bay Area Visitor & Convention Bureau, Inc.*, 2003 WI App 230, ¶ 12, 267 Wis. 2d 800, 672 N.W.2d 105 (question of law accepts an account of what happened and applies legal rules to that account), *aff'd in part on other grounds, rev'd in part on other grounds*, 2004 WI 98, 274 Wis. 2d 162, 682 N.W.2d 857.

"Whether the facts … fulfill a particular legal standard is a question of law which we review de novo." *Ide v. LIRC*, 224 Wis. 2d 159, 166, 589 N.W.2d 363 (1999).

3. Ultimate Facts

"One of the most troublesome issues in administrative law is determining whether … the application of a statutory concept to a concrete fact situation, should be treated as a question of fact or of law for purposes of judicial review. In many cases we have said that the determination of whether the facts fulfill a particular legal standard is a question of law. The conclusions that there is a 'voluntary termination' or that 'good cause attributable to the employing unit' exists are drawn from the underlying findings of fact,

and we label them legal conclusions." *Nottelson v. Department of Indus., Lab. & Hum. Rels.*, 94 Wis. 2d 106, 115–16, 287 N.W.2d 763 (1980) (footnotes omitted); *see also CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 571–72, 579 N.W.2d 668 (1998) (quoting *Nottelson*, 94 Wis. 2d at 115–17).

"The *ultimate* facts which a finding should contain are, generally speaking, the *issuable* facts which a pleading should contain, and practically the same as the facts which a special verdict should contain. In either case the statement of the ultimate fact frequently includes a legal conclusion from evidentiary facts, and in either case it should, generally speaking, be such a fact that, if it were to be successfully denied, the conclusion of liability or nonliability based upon the findings as a whole is untenable." *Hixon v. Public Serv. Comm'n of Wis.*, 32 Wis. 2d 608, 628, 146 N.W.2d 577 (1966) (citations omitted).

4. Mixed Fact and Law

A mixed question of fact and law is one that requires findings as to what happened and then a conclusion as to the legal significance of those events.

Example. Whether a person was negligent is a mixed question of fact and law—what did the person do or not do, and what would a reasonable person have done in the same circumstances? *Millonig v. Bakken*, 112 Wis. 2d 445, 450, 334 N.W.2d 80 (1983). In this way, mixed questions of fact and law bear a close similarity to ultimate facts.

5. Constitutional Facts

A constitutional fact is a fact whose "determination is 'decisive of constitutional rights.'" William R. Bishin & Christopher D. Stone, *Constitutional Facts, in Law, Language and Ethics* 365–70 (1972), *reprinted in* Ruggero J. Aldisert, The Judicial Process: Readings, Materials and Cases 704 (1976). "Constitutional facts," such as the voluntariness of a confession or reasonableness of a search, depend in part on findings of historical facts. *State v. Suriano*, 2017 WI 42, ¶ 20, 374 Wis. 2d 683, 893 N.W.2d 543 (forfeiture of right to counsel); *State v. Hajicek*, 2001 WI 3, ¶ 15, 240 Wis. 2d 349, 620 N.W.2d 781 (voluntariness of confession); *State v. Flakes*, 140 Wis. 2d 411, 426, 410 N.W.2d 614 (Ct. App. 1987) (reasonableness of search). The latter are reviewed using the great-weight or clearly erroneous standard. The circuit court's "finding" of constitutional fact is independently reviewed by the appellate court as a conclusion of law. Hajicek, 2001 WI 3, ¶ 15, 240 Wis. 2d 349; *State v. Phillips*, 218 Wis. 2d 180, 190, 577 N.W.2d 794 (1998); *see State v. Anderson*, 2002 WI 7, ¶ 12, 249 Wis. 2d 586, 638 N.W.2d 301.

Appellate courts independently review constitutional facts because "'[t]he scope of constitutional protections, representing the basic value commitments of our society, cannot vary from trial court to trial court, or from jury to jury.'" *Phillips*, 218 Wis. 2d at 194 (citation omitted).

"In applying the skeletal constitutional rule, appellate courts flesh out the rule and provide guidance to litigants, lawyers, and trial and appellate courts." *State v. McMorris*, 213 Wis. 2d 156, 166, 570 N.W.2d 384 (1997).

Independent appellate review of constitutional facts allows courts to maintain control of and clarify legal principles and unify precedent. State v. Martwick, 2000 WI 5, ¶ 19, 231 Wis. 2d 801, 604 N.W.2d 552 (citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996)).

"The difference between constitutional facts, mixed questions of fact and law, and historical facts, or simply questions of fact, is 'often fuzzy at best.'" *State v. Byrge*, 2000 WI 101, ¶ 39, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted). For example, a competency determination, formerly reviewed as a mixed question of law and fact, now is subject to review under a clearly erroneous standard of review. *Id.* ¶¶ 40–41 (citing, e.g., *Maggio v. Fulford*, 462 U.S. 111 (1983)). "Based on our analysis of the case law since Fulford, we conclude that the Supreme Court classifies competency to stand trial within a discrete category in which the resolution of the legal issue is better left to the trial court." *Id.* ¶ 44. This is true even when the postconviction court is not the same court that tried or sentenced the defendant. *State v. Smith*, 2016 WI 23, ¶¶ 32–34, 367 Wis. 2d 483, 878 N.W.2d 135.

6. Discretion

Judicial discretion is defined as "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right." *Discretion*, Black's Law Dictionary (11th ed. 2019) (defining "judicial discretion"). It is "[t]he power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." *Bouvier's Law Dictionary* 305 (Baldwin's rev. ed. 1934).

"I take it that when a matter is committed to the discretion of the trial judge for determination, the judge has an appreciable latitude of choice of possible decisions, that he has the duty carefully to weigh the data before him, and to render a decision which he conscientiously thinks will promote the ends of justice." J. Russell McElroy, *Some Observations Concerning the Discretions Reposed in Trial Judges by the American Law Institute's Code of Evidence*, Model Code of Evidence 360 (1942).

V. Findings of Fact—Standards of Review

A. Findings of Historical Facts by Trial Court Without a Jury

1. Alternative Standards of Review

a. Great Weight and Clear-Preponderance Standard

"Findings of fact by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. The evidence supporting findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence." *J.A.L. v. State (In the Int. of J.A.L.)*, 162 Wis. 2d 940, 966, 471 N.W.2d 493 (1991).

b. Clearly Erroneous Standard: Wis. Stat. § 805.17(2)

"Findings of fact shall not be set aside unless clearly erroneous…." Wis. Stat. § 805.17(2).

c. Apply Either Standard

The clearly erroneous test and the great-weight and clear-preponderance tests are essentially the same, and the appellate court may refer to cases that apply the great-weight standard for an explanation of the clearly erroneous standard. *State v. Martwick*, 2000 WI 5, ¶ 18 n.8, 231 Wis. 2d 801, 604 N.W.2d 552; *J.A.L. v. State (In the Int. of J.A.L.)*, 162 Wis. 2d 940, 966, 471 N.W.2d 493 (1991).

Cf. Easley v. Cromartie, 532 U.S. 234, 242 (2001) (holding that finding not clearly erroneous just because reviewing court would have made different decision; rather, reviewing court, upon viewing the "entire evidence," must reach "definite and firm" conclusion that finder of fact has erred).

2. Mislabeled Findings

A conclusion of law will be reviewed as such even if the circuit court mislabeled it as a finding of fact. *See Crowley v. Knapp*, 94 Wis. 2d 421, 429–30, 288 N.W.2d 815 (1980).

3. Factual Inferences

a. Only One Reasonable Factual Inference

If only one reasonable inference can be drawn from the evidence, the drawing of that inference is a question of law. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 237, 517 N.W.2d 658 (1994).

See also State ex rel. Coleman v. McCaughtry, 2006 WI 49, ¶¶ 34–37, 290 Wis. 2d 352, 714 N.W.2d 900, which reversed the court of appeals' decision that a prisoner's 17-year delay in commencing habeas proceedings prejudiced the state. When an inquiry of postconviction counsel had not yet been conducted, but it might have revealed that the attorney still had an adequate memory of why he chose not to pursue an appeal, the court of appeals could not decide as a matter of law that the attorney's recollection was impaired by the passage of time. *Id.* ¶ 36. The supreme court ruled that the court of appeals instead must select an appropriate method of fact-finding, e.g., use of a special master or remand to the circuit court. *Id.* ¶ 38.

b. Several Reasonable Factual Inferences

"The drawing of an inference on undisputed facts when more than one inference is possible is a finding of fact which is binding upon an appellate court. It is not within the province of … any appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one." *State v. Friday*, 147 Wis. 2d 359, 370–71, 434 N.W.2d 85 (1989). An appellate court can reject a clearly unreasonable inference. *Id.* at 371.

c. Reasonableness of Inference

Whether a factual inference may be drawn, whether it is reasonable, and whether it is the only reasonable inference are all questions of law for the appellate court to decide. *Groom v. Professionals Ins. Co.*, 179 Wis. 2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993).

"An elementary principle is that an inferred fact is a logical factual conclusion drawn from basic facts or historical evidence. It is the probability that certain consequences can and do follow from basic events or conditions as dictated by logic and human experience." *Belich v. Szymaszek*, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999).

d. Some Facts Must Be Inferred

Because intent is not generally susceptible to direct proof, the state of a person's mind "must be inferred from the acts and statements of the person, in view of the surrounding circumstances." *See Elmakias v. Wayda*, 228 Wis. 2d 312, 320, 596 N.W.2d 869 (Ct. App. 1999) (citation omitted).

e. Effect of Inference

Permissive inference or permissive presumption permits the fact-finder to infer the elemental fact from the state's proof of the basic fact, but it does not require the fact-finder to reach that conclusion or shift the burden to the defendant. *State v. Ward*, 2000 WI 3, ¶ 121, 231 Wis. 2d 723, 604 N.W.2d 517 (Prosser, J., dissenting).

f. Documentary Evidence Exception

(1) The great-weight or clearly erroneous rule is inapplicable to factual inferences from documents because findings based on documents do not depend on credibility of witnesses. *See State v. Pepin*, 110 Wis. 2d 431, 435–36, 438–39, 328 N.W.2d 898 (Ct. App. 1982) (recognizing deference based on trial court's superior ability to determine credibility from demeanor; no demeanor observations possible from a document).

(2) The appellate court is "in just as good a position as the trial court to make factual inferences based on documentary evidence and … need not defer to the trial court's findings." *Cohn v. Town of Randall*, 2001 WI App 176, ¶ 7, 247 Wis. 2d 118, 633 N.W.2d 674.

(3) Should the clearly erroneous standard apply?

(a) The federal courts follow a different approach from Wisconsin's. The "clearly erroneous" standard applies "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (applying Fed. R. Civ. P. 52(a)).

(b) In *Village of Menominee Falls v. Veierstahler*, 183 Wis. 2d 96, 515 N.W.2d 290 (Ct. App. 1994), the court observed that the law was in flux and appellate courts sometimes applied a "reasonableness" standard to the circuit court's inferences. *See Veierstahler*, 183 Wis. 2d at 101 n.7 (citing *Pfeifer v. World Serv. Life Ins. Co.*, 121 Wis. 2d 567, 570, 360 N.W.2d 65 (Ct. App. 1984)). The court of appeals subsequently decided *Cohn v. Town of Randall*, 2001 WI App 176, ¶ 7, 247 Wis. 2d 118, 633 N.W.2d 674, which held that the question of a grantor's intent was subject to de novo standard when the grantor was deceased and only documentary evidence was available.

After *Cohn*, the supreme court decided *Phelps v. Physicians Insurance Co. of Wisconsin*, 2009 WI 74, 319 Wis. 2d 1, 768 N.W.2d 615. The court in Phelps concluded that the standard of review based on the documentary evidence exception applies only to inferences the circuit court draws from established or undisputed facts based solely on a documentary record. *Id.* ¶ 38 n.10. "[W]here the underlying facts are in dispute, the circuit court resolves that dispute by exercising its fact-finding function, and its findings are subject to the clearly erroneous standard of review even if they are based solely on documentary evidence." *Id.* What precisely encompasses the standard of review under this exception remains an open question of law. *Id.* Thus, when the facts are established or undisputed, it is unclear whether inferences a circuit court draws from purely documentary evidence are reviewed merely for "reasonableness" or are subject to de novo review.

(4) Inferences based on another inference

"[B]uilding an inference upon an inference" was described as speculation in *Home Savings Bank v. Gertenbach*, 270 Wis. 386, 404, 71 N.W.2d 347 (1955).

But see 1A John Henry Wigmore, *Evidence in Trials at Common Law* § 41, at 1111 (1983): "There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted." The fallacy has been frequently repudiated in judicial opinions.

g. Video Evidence

"[W]hen evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the trial court's findings of fact based on that recording." *State v. Walli*, 2011 WI App 86, ¶ 17, 334 Wis. 2d 402, 799 N.W.2d 898.

4. Mixed Fact and Law

a. Whether something is a question of law or of fact is itself a question of law for the appellate court. *State v. Byrge*, 2000 WI 101, ¶ 32, 237 Wis. 2d 197, 614 N.W.2d 477.

b. Apply great-weight or clearly erroneous standard to the factual part and then independently review conclusion of law. *State v. McMorris*, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997).

See State v. Ndina, 2009 WI 21, ¶ 45, 315 Wis. 2d 653, 761 N.W.2d 612, applying the two-step standard of review to the Sixth Amendment right to a public trial. *But see* "Intertwined Law and Fact," *infra* VI.A.3.

5. Facts Established

The application of facts that are not clearly erroneous to a legal standard is a question of law. *See, e.g.*, *State v. McMorris*, 213 Wis. 2d 156, 165–66, 570 N.W.2d 384 (1997).

6. Facts Undisputed

If the facts are undisputed, the question is one of law. *GMAC Mortg. Corp. of Pa. v. Gisvold*, 215 Wis. 2d 459, 470, 572 N.W.2d 466 (1998).

7. Fact Not Subject to Reasonable Dispute—Judicial Notice of Adjudicative Facts

See Wis. Stat. § 902.01(2). It must not be a fact that is known to the judge as an individual. *State v. Peterson*, 222 Wis. 2d 449, 457, 588 N.W.2d 84 (Ct. App. 1998) (holding it improper for judge to reject, on basis of his own experience, witness's testimony that videotape was accurate portrayal of demonstration when witness was present at demonstration).

8. Facts Stipulated

If all the facts are stipulated, only a question of law remains. *See Lewis v. Physicians Ins. Co. of Wis.*, 2001 WI 60, ¶ 9, 243 Wis. 2d 648, 627 N.W.2d 484.

In the criminal context, a defendant stipulates to facts when the defendant enters a guilty or no-contest plea, which is required before the circuit court can accept the plea under Wis. Stat. § 971.08(1). Similar stipulations occur in the context of pleas in children's court proceedings for the termination of parental rights or for children in need of protection or services (CHIPS). *State v. E.R.W. (In the Int. of A.N.B.)*, Nos. 2020AP1778, 2020AP1779, 2020AP1780, 2021 WL 2351496, ¶¶ 16–22 (Wis. Ct. App. June 9, 2021) (unpublished opinion citable for persuasive value per Wis. Stat. § 809.23(3)(b)) (review denied). *E.R.W.* distinguished between the historical facts admitted by the defendant or otherwise found by the circuit court and the existence of a factual basis for the plea. Even if the proceedings involve fact-finding, whether the stipulated facts satisfy the elements of the charged crime (or establish grounds for a CHIPS order) is a legal determination reviewed de novo. *Id.* ¶ 22 & n.6.

9. Record Silent

If no transcripts provided to appellate court, facts stated by circuit court are presumptively established. *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353 n.2, 526 N.W.2d 822 (Ct. App. 1994) ("In the absence of a transcript, we will assume that every fact essential to sustain the trial court's exercise of discretion is supported by the record.").

10. Documentary Facts

When the evidence is the parties' written exhibits and submissions, appellate courts uphold a circuit court's findings of fact, unless clearly erroneous, if those findings concern the meaning of the evidence and not the sufficiency of the evidence. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶¶ 34, 37–38, 319 Wis. 2d 1, 768 N.W.2d 615.

The appellate court is not bound by the inferences that the circuit court has drawn from documentary evidence. *Cohn v. Town of Randall*, 2001 WI App 176, ¶ 7, 247 Wis. 2d 118, 633 N.W.2d 674.

When the circuit court record is a "paper record," consisting of a petition, briefs, and a transcript, the appellate court is in as good a position as the circuit court to address an issue. *Weinberger v. Bowen (In re Catherine H. Bowen Charitable Tr.)*, 2000 WI App 264, ¶ 7, 240 Wis. 2d 55, 622 N.W.2d 471; *see also State v. Anson*, 2005 WI 96, ¶ 13, 282 Wis. 2d 629, 698 N.W.2d 776 (holding that *Harrison* hearing, *see Harrison v. United States*, 392 U.S. 219 (1968), is a paper-record review, and confining circuit court to the record).

11. Transcript Made Before Another Court or Judge

The court of appeals made de novo review of factual findings by Judge A on the basis of a transcript made before Judge B, because Judge A did not observe the witnesses and was in no better position to make findings than the appellate court. *Racine Educ. Ass'n v. Racine Bd. of Educ.*, 145 Wis. 2d 518, 521, 427 N.W.2d 414 (Ct. App. 1988).

"When the parties so stipulate, the successor court may properly review the record and render findings of fact, including determining credibility and the weight to be afforded to each witness's testimony in resolving factual disputes." *Ladwig v. Ladwig*, 2010 WI App 78, ¶ 11, 325 Wis. 2d 497, 785 N.W.2d 664. The appellate court will uphold the successor trial court's findings of fact unless they are clearly erroneous. *Id.* ¶ 15.

12. Contracts

The meaning of an unambiguous contract is a question of law. *Rasmussen v. Blue Cross/Blue Shield United of Wis., Inc.*, 2000 WI App 220, ¶ 5, 239 Wis. 2d 120, 619 N.W.2d 147. The appellate court determines whether ambiguity exists, as a matter of law. *Id.* If the contract is ambiguous, the intent of the parties is a question of fact. *Insurance Co. of N. Am. v. DEC Int'l, Inc.*, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). But if neither party offered extrinsic evidence as to intent, the appellate court decides the meaning as a matter of law. *Reserve Life Ins. Co. v. La Follette*, 108 Wis. 2d 637, 646, 323 N.W.2d 173 (Ct. App. 1982).

Whether a contract provision is unconscionable is a question of law. *See Wisconsin Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶ 25, 290 Wis. 2d 514, 714 N.W.2d 155.

For a discussion of the rules of construction of insurance contracts, specifically as they apply to fidelity bonds, *see Tri City National Bank v. Federal Insurance Co.*, 2004 WI App 12, ¶¶ 9, 11, 268 Wis. 2d 785, 674 N.W.2d 617 (holding that because fidelity bonds are not usual contracts of adhesion, the familiar rule of interpreting contract strictly against insurer and liberally in favor of insured does not apply).

13. Formulas

If the result turns on mathematical or economic principles, the appellate court is in the same position as the circuit court and need not defer to the latter's decision. *Soo Line R.R. v. Wisconsin Dep't of Revenue*, 97 Wis. 2d 56, 60, 292 N.W.2d 869 (1980). *But see Siker v. Siker*, 225 Wis. 2d 522, 530, 593 N.W.2d 830 (Ct. App. 1999) (declining to apply *Soo Line* to appellate review of circuit court's valuation of a closely held business, opting instead for clearly erroneous standard). *Siker* noted the paucity of cases applying *Soo Line* and concluded that *Soo Line* is limited to the context of appellate review of property value assessments by a taxing authority.

14. Missing or Inadequate Findings

a. The appellate court cannot make findings of fact if the facts are contested. *Tourtillott v. Ormson Corp.*, 190 Wis. 2d 291, 294, 526 N.W.2d 515 (Ct. App. 1994).

b. When acting as the fact-finder, the circuit court must separately state findings and conclusions, but if an opinion is filed, "it will be sufficient if the finding … and conclusions of law appear therein." Wis. Stat. § 805.17(2).

c. It is not necessarily reversible error if the circuit court fails to make specific findings of fact. *Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 394, 588 N.W.2d 67 (Ct. App. 1998).

d. If the circuit court fails to make a finding of fact, the appellate court can (1) affirm the judgment if clearly supported by the preponderance of the evidence, (2) reverse if not so supported, or (3) remand for findings and conclusions. *Id.*; *see State v. Mark A. (In re Paternity of Jeremy D.L.)*, 177 Wis. 2d 551, 559, 503 N.W.2d 275 (Ct. App. 1993) (holding that appellate court should affirm in situations in which circuit court reached result that the evidence would sustain if a specific finding supporting that result had been made).

e. But in family law cases, the appellate court can decline to accept a memorandum decision that contains inadequate findings and has the right to remand for proper findings. *State v. Margaret H. (In re Termination of Parental Rts. to Darryl T.-H.)*, 2000 WI 42, ¶ 38, 234 Wis. 2d 606, 610 N.W.2d 475.

f. The appellate court may retain jurisdiction pending a remand for findings. *See State v. Hampton*, 201 Wis. 2d 662, 673–74, 549 N.W.2d 756 (Ct. App. 1996).

g. The appellate court can reverse a conviction and remand for trial court to make further findings of fact and either to reinstate conviction or direct new trial, depending on finding. *State v. Sorenson*, 152 Wis. 2d 471, 497–98, 449 N.W.2d 280 (Ct. App. 1989).

15. Implied Findings

The appellate court can assume that a missing finding on an issue was determined in a manner that supports the final decision. *State v. Pallone*, 2000 WI 77, ¶ 44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568, *overruled on other grounds by State v. Dearborn*, 2010

WI 84, ¶¶ 25, 27, 327 Wis. 2d 252, 786 N.W.2d 97. *Dearborn* also cited *Pallone* in its summary of the standard of review. *See Dearborn*, 2010 WI 84, ¶ 13, 327 Wis. 2d 252.

16. Findings Improper on Motion for Summary Judgment

Summary-judgment methodology prohibits the circuit court from resolving factual disputes. *Korntved v. Advanced Healthcare*, S.C., 2005 WI App 197, ¶ 9, 286 Wis. 2d 499, 704 N.W.2d 597. The court must follow the procedure outlined in *Strasser v. Transtech Mobile Fleet Service, Inc.*, 2000 WI 87, ¶¶ 30–32, 236 Wis. 2d 435, 613 N.W.2d 142 (citing *Grams v. Boss*, 97 Wis. 2d 332, 338–39, 294 N.W.2d 473 (1980), and *Preloznik v. City of Madison (In re Cherokee Park Plat)*, 113 Wis. 2d 112, 115–16, 334 N.W.2d 580 (Ct. App. 1983)).

Circuit courts occasionally recite the "undisputed" facts by way of formal "findings of fact." This is not only permissible but helpful to the appellate court.

It cannot be assumed that, just because both parties move for summary judgment, there is no dispute as to any material fact. *See Millen v. Thomas*, 201 Wis. 2d 675, 689–90, 550 N.W.2d 134 (Ct. App. 1996) (Brown, J., concurring). The circuit court must independently verify, based on reading the factual assertions from the summary-judgment materials of all parties, that no material issue of fact remains to be resolved. *See id.*; *Strasser*, 2000 WI 87, ¶ 32, 327 Wis. 2d 252 (explaining that court must determine whether any genuine issue of material fact remains for resolution in a summary-judgment motion).

17. "Pure" Facts—Foreign Law

Typically, the meaning of a legal authority (e.g., statutes, case law) is determined as a matter of law, and it is therefore subject to de novo review. This is not so for questions involving the meaning of another country's laws. In Wisconsin, the substance of another country's laws must be proved before the circuit court, and judicial notice is unavailable. *Hennessy v. Wells Fargo Bank, N.A.*, 2022 WI 2, ¶¶ 23, 37, 400 Wis. 2d 50, 968 N.W.2d 684 (citing Wis. Stat. § 902.02(5)). Under this "pure fact" approach, *see Griffin v. Mark Travel Corp.*, 2006 WI App 213, ¶ 4, 296 Wis. 2d 642, 724 N.W.2d 900, a circuit court's findings regarding the meaning of another country's laws are reviewed using the clearly erroneous standard, *Hennessy*, 2022 WI 2, ¶ 37, 400 Wis. 2d 50. This standard of review applies even to the circuit court's interpretation of English-language translations of a foreign court's decisions. *Hennessy v. Wells Fargo Bank, N.A.*, 2020 WI App 64, ¶ 18, 394 Wis. 2d 357, 950 N.W.2d 877, *aff'd*, 2022 WI 2, ¶ 7 n.2, 400 Wis. 2d 50.

B. Constitutional Facts

1. Definitions—*see supra* IV.B.5.

2. Historical facts found by circuit court are reviewed under the great-weight or clearly erroneous standard. *State v. Hajicek*, 2001 WI 3, ¶ 15, 240 Wis. 2d 349, 620 N.W.2d 781; *State v. Phillips*, 218 Wis. 2d 180, 190, 577 N.W.2d 794 (1998).

3. Appellate review of *constitutional facts* on basis of established facts is de novo: "The reviewing court has the duty to apply constitutional principles to the facts as found in order to ensure that the scope of constitutional protections does not vary from case to case." *State v. Turner*, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987). (Opinion contains helpful discussion and citations.) *See also State v. Jennings*, 2002 WI 44, ¶ 21, 252 Wis. 2d 228, 647 N.W.2d 142; *State v. Jimmie R.R.*, 2004 WI App 168, ¶ 30, 276 Wis. 2d 447, 688 N.W.2d 1.

4. Wisconsin courts apply a two-step standard of review to curtilage determinations, *State v. Martwick*, 2000 WI 5, ¶¶ 16–18, 231 Wis. 2d 801, 604 N.W.2d 552, and search-and-seizure inquiries, *Phillips*, 218 Wis. 2d at 189–95 (providing several examples of constitutional challenges that appellate courts review independently of a circuit court's conclusion). Whether a defendant has forfeited the constitutional right to counsel is also a question of constitutional fact. *State v. Suriano*, 2017 WI 42, ¶ 20, 374 Wis. 2d 683, 893 N.W.2d 543.

C. Findings by Jury

1. Civil Case—Standard of Review

"[The appellate court] will not upset a jury verdict if there is any credible evidence to support it. This is even more true when the trial court gives its explicit approval to the verdict…. The credibility of the witnesses and the weight afforded their individual testimony are left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury. It is this court's duty to search for credible evidence to sustain the jury's verdict, and we are not to search the record for evidence to sustain a verdict the jury could have reached but did not." *Radford v. J.J.B. Enters., Ltd*., 163 Wis. 2d 534, 543, 472 N.W.2d 790 (Ct. App. 1991) (citations omitted).

When the question is whether the trial court properly changed the jury's answer to a special verdict question, "the standard of review depends on whether the jury's alleged error is properly characterized as an error of law or of fact." *State v. Abbott Labs.*, 2012 WI 62, ¶ 27, 341 Wis. 2d 510, 816 N.W.2d 145. When the trial court has sufficiently instructed the jury, the jury's error is best understood as one of fact, and the reviewing court applies a sufficiency-of-the-evidence standard. *Id.* But when the circuit court upholds a jury's finding on motions after verdict, the appellate court applies a more "stringent" standard, refusing to overturn the jury's verdict unless there is such a complete failure of proof that the verdict must be based on speculation. *Gaethke v. Pozder*, 2017 WI App 38, ¶ 14, 376 Wis. 2d 448, 899 N.W.2d 381.

When a party forfeits an objection to a jury instruction, in a civil case "we evaluate the evidence in the context of the instructions that were given to the jury." *Best Price Plumbing, Inc. v. Erie Ins. Exch.*, 2012 WI 44, ¶ 42, 340 Wis. 2d 307, 814 N.W.2d 419.

"[W]hen the trial judge rules, either on motion for nonsuit, motion for a directed verdict, or motion to set aside the verdict, that there is or is not sufficient evidence upon a given question to take the case to the jury, the trial court has such superior advantages for judging of the weight of the testimony and its relevancy and effect that [the reviewing] court should not disturb the decision merely because, on a doubtful balancing of probabilities, the mind inclines slightly against the decision, but only when the mind is clearly convinced that the conclusion of the trial judge is wrong." *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 784, 541 N.W.2d 203 (Ct. App. 1995) (emphasis omitted) (citation omitted).

The trial court must not grant a motion for a directed verdict based on the sufficiency of the evidence unless the court is satisfied that, considering all credible evidence and any reasonable inferences from that evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of that party. *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). On review, the appellate court must apply the same standard, and it should not reverse the trial court unless its decision is clearly wrong. *Id.* at 388–89. This "clearly wrong" standard and the "any credible evidence" standard are not two different standards, but only flip sides of the same coin. *Id.* at 389–90 & n.9. A trial court is clearly wrong when it grants a motion for a directed verdict despite the existence of credible evidence to the contrary. *Id.*

When a directed verdict is based on a legal error, review does not depend on sufficiency of the evidence but on "application of undisputed facts to principles of law." *Gagliano & Co. v. Openfirst, LLC*, 2014 WI 65, ¶ 31, 355 Wis. 2d 258, 850 N.W.2d 845. The legal basis for a directed verdict is reviewed independently. *Id.* ¶ 32.

2. Criminal Case—Standard of Review Generally

When the defendant challenges the sufficiency of the evidence, the test is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt. *State v. Von Loh,* 157 Wis. 2d 91, 101, 458 N.W.2d 556 (Ct. App. 1990). "Conversely stated, the test is whether, when considered most favorably to the state and the conviction, the evidence is so insufficient in probative value and force that it can be said as a matter of law that no trier of facts acting reasonably could be convinced to that degree of certitude which the law defines as 'beyond a reasonable doubt.' Furthermore, it is not necessary that this court be convinced of the defendant's guilt but only that the court is satisfied the jury acting reasonably could be so convinced. *State v. Blaisdell*, 85 Wis. 2d 172, 180–81, 270 N.W.2d 69 (1978) (citations omitted).

"When an appellate court independently reviews the evidence presented at trial to determine whether, in its view, there are reasonable theories consistent with the defendant's innocence, it replaces the trier of fact's overall evaluation of the evidence with its own. A theory of innocence which appears to be reasonable to an appellate court on review of the record may have been rejected as unreasonable by the trier of fact in view of the evidence and testimony presented at trial. It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *State v. Bodoh*, 226 Wis. 2d 718, 727, 595 N.W.2d 330 (1999) (citation omitted).

"[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." *Id.* at 728 (citation omitted).

3. Criminal Case—Circumstantial Evidence

A criminal conviction may rest entirely on circumstantial evidence, even if the circumstantial evidence supporting the conviction also supports an equally reasonable theory of innocence. *See State v. Poellinger*, 153 Wis. 2d 493, 501, 503, 505–08, 451 N.W.2d 752 (1990). The appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict. *Id.* at 507–08.

4. Criminal Case—Conceded Element

In *State v. Wallerman*, 203 Wis. 2d 158, 167–68, 552 N.W.2d 128 (Ct. App. 1996), the court of appeals held that the state may rely on a defendant's concession or stipulation to an element of the crime. In *State v. Veach*, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447, the supreme court limited *Wallerman* by stating that, "to the extent … *Wallerman* … impl[ies] that the state and the circuit court are obligated to accept *Wallerman* stipulations, [*Wallerman*] … must be overruled." *Id.* ¶ 118.

With the exception of stipulations to a defendant's status, the state and the court are not obligated to accept stipulations to elements of a crime, even if the stipulations are offered in compliance with the four-part test set forth in *Wallerman. Veach*, 2002 WI 110, ¶ 118, 255 Wis. 2d 390.

5. Search Record to Support Findings

The appellate court will search the record for evidence to support the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. *Morden v. Continental AG*, 2000 WI 51, ¶ 39, 235 Wis. 2d 325, 611 N.W.2d 659.

D. Findings by Administrative Agency

1. Circuit and Appellate Court Employ Same Review Standard

Review is identical at both levels. *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 117, 438 N.W.2d 823 (1989). The appellate court reviews the agency's decision, not the circuit court's. *Motola v. LIRC*, 219 Wis. 2d 588, 597, 580 N.W.2d 297 (1998).

Caveat. But see *Bloomer Housing Ltd. Partnership v. City of Bloomer*, 2002 WI App 252, ¶ 11, 257 Wis. 2d 883, 653 N.W.2d 309, in which the court of appeals held that a circuit court reviewing a tax assessment board's decision in an action under Wis. Stat. § 74.37(3)(d) may take additional evidence if doing so is in the parties' interests. The *Bloomer* court stated it would not upset the circuit court's findings of fact unless the findings were clearly erroneous. *Id.* ¶ 12. According to *Bloomer*, the circuit court need only give presumptive weight to the city's assessment if the opposing party does not present "significant contrary evidence." *Id.* ¶ 11; *see also Adams Outdoor Advert., Ltd. v. City of Madison*, 2006 WI 104, ¶ 25, 294 Wis. 2d 441, 717 N.W.2d 803.

2. Substantial Evidence—Wis. Stat. ch. 227 Review and Certiorari

a. "Substantial evidence does not mean a preponderance of the evidence. Rather, the test is whether, taking into account all the evidence in the record, 'reasonable minds could arrive at the same conclusion as the agency.'" *Responsible Use of Rural & Agric. Land (RURAL) v. Public Serv. Comm'n of Wis.*, 2000 WI 129, ¶ 20, 239 Wis. 2d 660, 619 N.W.2d 888 (citation omitted).

b. The agency's finding may be supported by substantial evidence even though it is contrary to the great weight and clear preponderance of the evidence. *See Kitten v. DWD*, 2001 WI App 218, ¶ 20, 247 Wis. 2d 661, 634 N.W.2d 583, *aff'd on other grounds*, 2002 WI 54, 252 Wis. 2d 561, 644 N.W.2d 649.

c. Substantial evidence is the quantity and quality of evidence that a reasonable person could accept as adequate to support a conclusion. *Kitten*, 2001 WI App 218, ¶ 19, 247 Wis. 2d 661. It is less of a burden than preponderance of the evidence in that any reasonable view of the evidence is sufficient. *Bernhardt v. LIRC*, 207 Wis. 2d 292, 298, 558 N.W.2d 874 (Ct. App. 1996).

3. Credible and Substantial Evidence in Other Contexts

Unemployment Insurance and Worker's Compensation Acts—Wis. Stat. § 102.23(6); *see also* Wis. Stat. § 108.09(7)(f).

4. Factual Inferences

Review of an agency's factual inferences is the same as review of the circuit court's factual inferences. *Compare Bernhardt v. LIRC*, 207 Wis. 2d 292, 299, 558 N.W.2d 874 (Ct. App. 1996) (when agency can reasonably draw more than one inference from the evidence, appellate court must accept agency's reasonable inference as conclusive), with V.A.3, *supra*.

5. Undisputed, Established, or Stipulated Facts—Question of Law Presented

a. Once the facts are established, the determination whether those facts fulfill the statutory standard is a legal conclusion. *Kitten v. DWD*, 2001 WI App 218, ¶ 22, 247 Wis. 2d 661, 634 N.W.2d 583, *aff'd*, 2002 WI 54, 252 Wis. 2d 561, 644 N.W.2d 649.

b. If the material facts are undisputed, the reviewing court applies its judgment on the law. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion).

c. If the facts are stipulated, the only question is one of law. *See Wisconsin Dep't of Revenue v. Caterpillar, Inc.*, 2001 WI App 35, ¶ 6, 241 Wis. 2d 282, 625 N.W.2d 338.

6. Inference Drawn by an Agency from Facts

Review may be a question of law or of fact. "If only one reasonable inference can be drawn from the evidence, the drawing of that inference is a question of *law*, and the circuit court is not bound by the determination of the Commission. If, however, different inferences can reasonably be drawn from the evidence, then a question of fact is presented and the inference actually drawn by the Commission, if supported by any credible evidence, is conclusive." *Vocational, Tech. & Adult Educ., Dist. 13 v. Department of Indus., Lab. & Hum. Rels.*, 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977) (emphasis added); *see also Bernhardt v. LIRC*, 207 Wis. 2d 292, 299, 558 N.W.2d 874 (Ct. App. 1996) (when an agency can reasonably draw more than one inference from the evidence, appellate court must accept that inference as conclusive).

7. Missing and Mislabeled Administrative Findings

Supply or remand? "Where the evidence is clear and convincing, this Court, or the trial court, can supply a finding of fact—missing from the agency decision—where it might be required." *City of La Crosse Police & Fire Comm'n v. LIRC*, 139 Wis. 2d 740, 769–70, 407 N.W.2d 510 (1987). The reviewing court will treat a mislabeled finding as what it is, rather than as what it is called. *See Citizens' Util. Bd. v. Public Serv. Comm'n of Wis.*, 211 Wis. 2d 537, 550, 565 N.W.2d 554 (Ct. App. 1997). "Nonetheless, [Wis. Stat. §] 227.10 [now Wis. Stat. § 227.47] … has been interpreted to require remand when an administrative body has omitted necessary factual findings or when the factual basis for the decision is otherwise uncertain and unclear in cases where the evidence in the record is inconclusive or totally lacking, thus making it impossible for the court to supply the necessary finding on review." *Connecticut Gen. Life Ins. Co. v. Department of Indus., Lab. & Hum. Rels.*, 86 Wis. 2d 393, 405, 273 N.W.2d 206 (1979); *see also State v. Trudeau*, 139 Wis. 2d 91, 110, 408 N.W.2d 337 (1987) (supreme court remanded because findings inadequate to make judicial review possible).

The reviewing court may infer that an agency made unexpressed factual finding that evidence supports. *Doersching v. Funeral Dirs. & Embalmers Examining Bd.*, 138 Wis. 2d 312, 323, 405 N.W.2d 781 (Ct. App. 1987).

A missing finding may be inferred from the agency's other properly made findings. *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. Department of Indus., Lab. & Hum. Rels.*, 172 Wis. 2d 299, 330, 493 N.W.2d 744 (Ct. App. 1992).

But a missing finding may be a rejection of testimony. "The taxpayer would have us accept as facts much of the testimony of its witness which never found its way into the commission's findings…. The commission was not bound to accept all of the taxpayer's testimony merely because no witness testified to the contrary…. Since the commission's specific findings are uncontested and since it considered the taxpayer's evidence, we conclude that the commission rejected those parts of the evidence which are not reflected in the commission's specific findings of fact." *Spacesaver Corp. v. Wisconsin Dep't of Revenue*, 140 Wis. 2d 498, 503–04, 410 N.W.2d 646 (Ct. App. 1987).

8. Nonreviewability for Insufficient Findings

If the agency's findings are so insufficient as to render the decision nonreviewable, remand is necessary. *State v. Trudeau*, 139 Wis. 2d 91, 110, 408 N.W.2d 337 (1987).

9. Review of Tax Assessment Appeals

A court reviewing a tax assessment gives the municipality's assessment "presumptive weight" so long as the challenging party does not present "significant contrary evidence." *Walgreen Co. v. City of Madison*, 2008 WI 80, ¶ 17, 311 Wis. 2d 158, 752 N.W.2d 687. No deference, however, is given to an assessment that does not follow the "principles in the [Wisconsin] Property Assessment Manual." *Id.* Whether a municipality has erroneously failed to follow statutory requirements is a question of law. *Id.*

E. Supreme Court Review of Court of Appeals

The supreme court ordinarily will not reexamine the court of appeals' determination that the circuit court's findings of fact were founded on sufficient evidence if a question of law is not specifically implicated. *See Currie v. Schwalbach*, 139 Wis. 2d 544, 552, 407 N.W.2d 862 (1987).

VI. Conclusions of Law—Standards of Review

A. Circuit Court's Conclusions

1. General Standard of Review

An appellate court must decide questions of law independently, without deference to the decision of the circuit court. *State v. Vanmanivong*, 2003 WI 41, ¶ 17, 261 Wis. 2d 202, 661 N.W.2d 76. But an appellate court values a circuit court's decision on a question of law. *Holman v. Family Health Plan*, 216 Wis. 2d 100, 108, 573 N.W.2d 577 (Ct. App. 1997), *rev'd on other grounds*, 227 Wis. 2d 478, 596 N.W.2d 358 (1999).

2. Examples

a. Statutory Construction

The most common questions of law involve the application of a statute to a particular set of facts. *See, e.g.*, *State v. Piddington*, 2001 WI 24, ¶ 13, 241 Wis. 2d 754, 623 N.W.2d 528.

The purpose of statutory interpretation is to determine what a statute means so that it may be given its full, proper, and intended effect. *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The court's obligation is to faithfully give effect to the policy choices enacted into law by the legislature. *Id.*

The first step in statutory interpretation is to consider the plain meaning of the language of the statute in light of the statute's scope, context, structure, and purpose. *State v. Williams*, 2014 WI 64, ¶ 17, 355 Wis. 2d 581, 852 N.W.2d 467. That plain meaning is

"typically" the end of the inquiry. *Id.* However, "'a plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose.'" *Id.* (quoting *Kalal*, 2004 WI 58, ¶ 49, 271 Wis. 2d 633).

If the language is ambiguous, even after considering its intrinsic context, scope, and purpose, the court may turn to extrinsic sources such as legislative history. *See Kalal*, 2004 WI 58, ¶ 48, 271 Wis. 2d 633.

In addition to ambiguity, a reviewing court also looks beyond the statute in certain other circumstances. *See Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶¶ 13–15, 293 Wis. 2d 123, 717 N.W.2d 258. It may consider legislative history to verify the plain meaning or to discern legislative intent when it concludes the plain meaning produces absurd results. *Id.* ¶¶ 14–15.

The meaning of a statute is a question of law. *Honthaners Rests., Inc. v. LIRC*, 2000 WI App 273, ¶ 10, 240 Wis. 2d 234, 621 N.W.2d 660.

b. Constitutionality of Statute

The constitutionality of a statute is a question of law. *Dane Cnty. v. McGrew*, 2005 WI 130, ¶ 8, 285 Wis. 2d 519, 699 N.W.2d 890. An appellate court must first engage in the threshold exercise of determining whether the constitutional challenge is "as applied"—an assertion that the statute violates some recognized right based on the unique facts of the challenger's case—or "facial"—an assertion that the law is unconstitutional in all its applications. *See Arty's, LLC v. Wisconsin Dep't of Revenue*, 2018 WI App 64, ¶ 47, 384 Wis. 2d 320, 919 N.W.2d 590. The categorization of the nature of the constitutional claim also appears to be a question of law. *See id.* ¶¶ 48–49.

Regardless of how the constitutional challenge is categorized, appellate courts presume that statutes are constitutional, and any doubts about the statute's constitutionality must be resolved in favor of upholding the statute. *Blake v. Jossart*, 2016 WI 57, ¶ 27, 370 Wis. 2d 1, 884 N.W.2d 484. A party challenging a statute must demonstrate the statute is unconstitutional beyond a reasonable doubt. *Id.*

c. Interpretation of Case Law

Wisconsin appellate courts interpret their own case law de novo. *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, ¶ 42, 362 Wis. 2d 577, 866 N.W.2d 563.

d. Existence of Duty

Whether a duty exists and the scope of any such duty are questions of law. *Brenner v. Amerisure Mut. Ins. Co.*, 2017 WI 38, ¶ 12, 374 Wis. 2d 578, 893 N.W.2d 193; *Nelson v. Davidson*, 155 Wis. 2d 674, 679, 456 N.W.2d 343 (1990).

e. Necessity of Expert Testimony

Whether expert testimony is necessary in a situation is a question of law, which appellate courts decide independently. *Racine Cnty. v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶ 24, 323 Wis. 2d 682, 781 N.W.2d 88.

3. Intertwined Law and Fact

A legal conclusion may be "so intertwined" with the factual findings as to require the appellate court to "give weight to the trial court's decision, although the trial court's decision is not controlling." *Putnam v. Time Warner Cable of Se. Wis.*, 2001 WI App 196, ¶ 17, 247 Wis. 2d 41, 633 N.W.2d 254 (reasonableness), *aff'd in part on other grounds*, *rev'd in part on other grounds*, 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626; *see also T.M.F. v. Children's Serv. Soc'y of Wis. (In the Int. of D.L.S.)*, 112 Wis. 2d 180, 188, 332 N.W.2d 293 (1983) (conclusion of "voluntary and informed consent" is "intertwined with the trial court's factual inquiry").

In child-support cases, for example, the appellate court reviews de novo the reasonableness of a parent's employment decision to determine whether the parent is "shirking" the parent's duty to support the children but gives appropriate deference to the circuit court's decision. *Chen v. Warner*, 2005 WI 55, ¶¶ 3, 34, 38, 43, 280 Wis. 2d 344, 695 N.W.2d 758.

B. Administrative Agency's Conclusion

1. Circuit and Appellate Court Review Is Identical

Review is identical. *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 117, 438 N.W.2d 823 (1989).

2. Reviewing Court Not Bound by Agency's Conclusion

Reviewing court is not bound by agency's conclusion of law. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion).

3. No Deference to Agency's Conclusions of Law

a. Courts review an administrative agency's conclusions of law under the same standard that appellate courts apply to a circuit court's conclusions of law—de novo. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion).

Caution. *Tetra Tech* was decided by a divided Wisconsin Supreme Court that produced four separate opinions. The lead opinion, written by Justice Daniel Kelly and joined by Justice Rebecca Grassl Bradley, concluded that deferring to an administrative agency on a question of law violates the separation of powers and gives rise to due-process concerns. *Id.* ¶¶ 55–56, 66–69. In a concurring opinion, Justice Ann Walsh Bradley, joined by Justice Shirley Abrahamson, wrote that although she agreed with the lead opinion's analysis of the specific statute at issue, she would not have discarded the previous three-tier approach to agency deference. *Id.* ¶¶ 111–112 (Bradley, A.W., J., concurring). Justice Annette Ziegler, in a concurring opinion joined in part by Chief Justice Patience Roggensack, argued it was unnecessary to invoke constitutional principles to overturn existing agency law. *Id.* ¶¶ 142, 155 (Ziegler, J., concurring). Similarly, Justice Michael Gableman, joined by Chief Justice Roggensack, would have used the doctrine of constitutional avoidance and merely overruled the prior case law establishing the three-tier approach. *Id.* ¶¶ 159–161 (Gableman, J., concurring). Thus, although a majority of the court agreed with eliminating judicial deference to an agency's conclusion of law, no one rationale for doing so commanded the agreement of a majority of the justices.

Caution. *Tetra Tech* "does not appear to have been extended to the judicial review of municipal decisions," and cases setting forth the standard of review for municipal decisions "were not abrogated by *Tetra Tech*." *Grycowski v. Milwaukee Emps.' Ret. Sys./Annuity & Pension Bd.*, 2021 WI App 7, ¶ 29 n.2, 395 Wis. 2d 722, 953 N.W.2d 904.

b. Courts still benefit from the administrative agency's analysis, particularly when that analysis is supplemented by certain "due weight" considerations. *Tetra Tech*, 2018 WI 75, ¶¶ 76–79, 84, 382 Wis. 2d 496 (lead opinion); *see also* Wis. Stat. § 227.57(10) (noting that, when reviewing agency decisions under Wis. Stat. ch. 227, courts should accord due weight to "the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it"). Such "due weight," however, does not direct courts to defer to an agency's interpretation or application of the law. *Tetra Tech*, 2018 WI 75, ¶ 76, 382 Wis. 2d 496 (lead opinion). Rather, due weight "is a matter of persuasion, not deference." *Id.* ¶ 78.

c. The de novo standard of review of all conclusions of law by administrative agencies is a substantial departure from prior case law. *See, e.g.*, *Racine Harley-Davidson, Inc. v. Division of Hearings & Appeals*, 2006 WI 86, ¶¶ 17–20, 292 Wis. 2d 549, 717 N.W.2d 184; *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661–62, 539 N.W.2d 98 (1995); *Pabst v. Wisconsin Dep't of Tax'n*, 19 Wis. 2d 313, 323–24, 120 N.W.2d 77 (1963). Previously, three different levels of deference were accorded to an agency's conclusion of law depending on the application of various considerations: (1) *great-weight deference*, which meant a court would accept a reasonable agency interpretation even if the court deemed another interpretation more reasonable; (2) *due-weight deference*, which meant a court would defer to the agency's interpretation so long as that interpretation was at least equally reasonable as the court's alternative; and (3) *no deference*, for which a court reviewed the agency's decision de novo, in which it could reject even an equally reasonable agency interpretation. *See Tetra Tech*, 2018 WI 75, ¶¶ 13–16, 382 Wis. 2d 496 (lead opinion).

4. Administrative Rules—Validity

a. The circuit court should require the party who challenges an administrative rule to state the type of challenge (constitutional, exceeding statutory authority, or failing to comply with statutory rulemaking procedures), the basis for each challenge, and the applicable standard of review. *Liberty Homes, Inc. v. Department of Indus., Lab. & Hum. Rels.*, 136 Wis. 2d 368, 376–77, 401 N.W.2d 805 (1987).

b. If a due-process challenge is based on a claim that insufficient facts of record support the rule, the court must ascertain the governmental objective and make "substantial inquiry"—one that is "searching and careful"—into the facts of record, to determine whether a rational connection exists between the facts and the agency's rulemaking choice. *Id.* at 371, 374 & n.4, 385–87. "In reaching its conclusion, the court must give due deference to the agency's expertise." *Id.* at 387.

c. If a statutory-authority challenge is made, the test for express authority is whether statutory elements have been satisfied. *Wisconsin Hosp. Ass'n v. Natural Res. Bd.*, 156 Wis. 2d 688, 705–06, 457 N.W.2d 879 (Ct. App. 1990). The court of appeals did not decide whether the court should employ the deferential federal standard announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984). *See Wisconsin Hosp. Ass'n*, 156 Wis. 2d at 706–07.

5. Administrative Rules—Review of Agency's Interpretation

a. Construction of administrative rules is governed by the same principles that apply to statutes. *State v. Busch*, 217 Wis. 2d 429, 441, 576 N.W.2d 904 (1998).

b. An agency's interpretation is controlling unless it is inconsistent with the language of the regulation or is plainly erroneous. *Id.*; *see also Aguilar v. Husco Int'l, Inc.*, 2015 WI 36, ¶ 17, 361 Wis. 2d 597, 863 N.W.2d 556. But note that the proper interpretation of administrative code provisions presents a question of law. *Town of Ledgeview v. Livestock Facility Siting Rev. Bd.*, 2022 WI App 58, ¶ 11, 405 Wis. 2d 269, 983 N.W.2d 685. It is unclear whether the principles announced in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶ 32, 382 Wis. 2d 496, 914 N.W.2d 21, regarding de novo review apply with equal force to an agency's interpretation of its own administrative regulations.

c. The court will afford controlling-weight deference to an agency that did not promulgate the rule at issue if that agency is charged by the legislature with "being the final authority" on the rule. *Wisconsin Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 53, 311 Wis. 2d 579, 754 N.W.2d 95 (citing *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶¶ 11, 13, 299 Wis. 2d 1, 727 N.W.2d 311); *see also id.* ¶¶ 54–55.

d. No comparable deference is paid to agency manuals and guidelines that are not supported by notice-and-comment rulemaking. *United States v. Mead Corp.*, 533 U.S. 218, 229–34 (2001). But an agency's policy statements may nonetheless be entitled to respect according to the degree of their persuasiveness. *Id.* at 234–35.

e. "[D]eference to agency positions is not an all-or-nothing proposition; more informal agency statements and positions receive a more flexible respect, in which factors like 'the degree of the agency's care, its consistency, formality, and relative expertness' … are all relevant." *U.S. Freightways Corp. v. Commissioner*, 270 F.3d 1137, 1141 (7th Cir. 2001) (citation omitted).

6. Agency's Decision Regarding Its Power

a. State: Agency's views regarding the extent of its powers not binding on court. *See, e.g.*, *Wright v. LIRC*, 210 Wis. 2d 289, 293, 565 N.W.2d 221 (Ct. App. 1997).

b. Federal: The federal courts apply the rational-basis test even to agency interpretations of statutes granting powers to the agency. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). See discussion of *Chevron* in *Wisconsin Hospital Ass'n v. Natural Resources Board*, 156 Wis. 2d 688, 706–07, 457 N.W.2d 879 (Ct. App. 1990).

7. Issue Must Be Raised Before Agency and Circuit Court

If an issue is not raised before an agency and the circuit court, it will not be reviewed by an appellate court. *Goranson v. Department of Indus., Lab. & Hum. Rels.*, 94 Wis. 2d 537, 545, 289 N.W.2d 270 (1980). A circuit court may sua sponte raise a constitutional issue on appeal from an agency decision, but, unless the issue is quite clear, the court should remand to the agency to afford the parties a chance to further develop the factual record, even when the agency has no authority to decide the constitutional issues. *Slawinski v. Milwaukee City Fire & Police Comm'n*, 212 Wis. 2d 777, 814–15, 569 N.W.2d 740 (Ct. App. 1997).

C. Supreme Court Review of Court of Appeals

The supreme court does not defer to the decision of the court of appeals on a question of law. *State v. Williams*, 2002 WI 1, ¶ 5, 249 Wis. 2d 492, 637 N.W.2d 733.

D. Arbitration Awards

A court's review of an arbitrator's award is generally very limited. *Racine Cnty. v. International Ass'n of Machinists & Aerospace Workers Dist.* 10, 2008 WI 70, ¶ 11, 310 Wis. 2d 508, 751 N.W.2d 312. The court's role is essentially supervisory in nature, to ensure that the parties to a collective bargaining agreement received the arbitration process for which they bargained. *Id.* A court must overturn an award, however, if the arbitrator exceeds the arbitrator's powers, which occurs when the arbitrator demonstrates "perverse misconstruction" or "positive misconduct," manifestly disregards the law, makes an illegal award, or makes an award that violates a strong public policy. *Id.* Whether the award meets this standard is a question of law. *Id.*

A different standard of review applies when matters extrinsic to the arbitration award itself are alleged to have affected the award's validity. When the circuit court takes evidence regarding matters extrinsic to the award (such as testimony that the arbitrator was sleeping during portions of the arbitration hearing), the court's findings will be reviewed using the clearly erroneous standard of review. *Loren Imhoff Homebuilder, Inc. v. Taylor*, 2022 WI App 14, ¶¶ 24–30, 401 Wis. 2d 510, 973 N.W.2d 836.

VII. Discretionary Decisions

A. Circuit Court's Discretionary Decision

1. Standard of Review—Generally

"A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." *Milwaukee Women's Med. Serv., Inc. v. Scheidler*, 228 Wis. 2d 514, 524, 598 N.W.2d 588 (Ct. App. 1999). Additionally, and most importantly, "a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." *Id.*

"'Because the exercise of discretion is not the equivalent of unfettered decision-making,' the record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case." *Id.* at 524–25 (citation omitted).

An appellate court will ordinarily find an erroneous exercise of discretion "if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or [the appellate] court finds that the trial court applied the wrong legal standard." *State v. Black*, 2001 WI 31, ¶ 9, 242 Wis. 2d 126, 624 N.W.2d 363 (citation omitted).

2. "Erroneous Exercise" Rather Than "Abuse"

The terminology used when reviewing a circuit court's discretionary act is that of an "erroneous exercise of discretion," not an "abuse of discretion," but the substance of the standard of review is the same. *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

3. Exercise of Discretion

a. Whether discretion was properly exercised is a question of law. *Luciani v. Montemurro-Luciani*, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996).

b. Appellate court first looks for evidence that discretion was in fact exercised. *J.A.L. v. State (In the Int. of J.A.L.)*, 162 Wis. 2d 940, 961, 471 N.W.2d 493 (1991). The test is not whether the reviewing court agrees with the ruling of the circuit court, but whether appropriate discretion was in fact exercised. *Martindale v. Ripp*, 2001 WI 113, ¶ 29, 246 Wis. 2d 67, 629 N.W.2d 698 (citation omitted).

c. Appellate review of a sentencing decision is tempered by strong public policy against interfering with the circuit court's discretion. *State v. Spears*, 220 Wis. 2d 720, 723–24, 585 N.W.2d 161 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999); *see also State v. Harris*, 2010 WI 79, ¶ 66, 326 Wis. 2d 685, 786 N.W.2d 409. In reviewing a sentencing decision, the appellate court will examine the record to ensure that the circuit court properly exercised its discretion and set forth a "rational and explainable basis" for that exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶ 76, 270 Wis. 2d 535, 678 N.W.2d 197. Consistent with this directive, a circuit court's mere mislabeling of a sentencing rationale is not reversible error if a reviewing court can discern a rationale that it is not improper. *State v. Whitaker*, 2021 WI App 17, ¶ 37, 396 Wis. 2d 557, 957 N.W.2d 561, *aff'd*, 2022 WI 54, 402 Wis. 2d 735, 976 N.W.2d 304.

A circuit court's rejection of a plea agreement is reviewed as an exercise of discretion. *State v. Conger*, 2010 WI 56, ¶ 14, 325 Wis. 2d 664, 797 N.W.2d 341.

d. A circuit court has broad discretion in the conduct of a trial, including in determining which jury instructions are appropriate. That discretion will be upheld if the instructions fully and fairly informed the jury of the applicable rules of law and assisted the jury in making a reasonable analysis of the evidence. *State v. Johnson*, 2021 WI 61, ¶ 16, 397 Wis. 2d 633, 961 N.W.2d 18. However, when the propriety of an instruction depends on a party establishing a sufficient evidentiary predicate, the question whether the party has presented sufficient evidence is a question of law and will be reviewed de novo. *Id.*

e. When the parties stipulate that a successor court conducting further proceedings—either on remand or as part of the original circuit court proceedings—may base its decision on the existing record, the successor court's exercise of discretion may be wholly independent of the original court. *Ladwig v. Ladwig*, 2010 WI App 78, ¶ 11 & n.5, 325 Wis. 2d 497, 785 N.W.2d 664.

f. The appellate court must not exercise the circuit court's discretion. *Milwaukee Women's Med. Serv., Inc. v. Scheidler*, 228 Wis. 2d 514, 528 n.5, 598 N.W.2d 588 (Ct. App. 1999).

g. An appellant may lose the right to complain that the circuit court failed to exercise discretion if the appellant failed to request the court to do so. *State v. Bustamante*, 201 Wis. 2d 562, 572–73, 549 N.W.2d 746 (Ct. App. 1996).

"We will not overturn a discretionary determination on a ground not brought to the attention of the trial court." *Id.* at 573 (citation omitted).

4. Discretionary Decision Versus Constitutional Right

Denial of a continuance may implicate the 6th Amendment right to effective assistance of counsel and the 14th Amendment right to due process. *State v. Echols,* 175 Wis. 2d 653, 680, 499 N.W.2d 631 (1993). The standard for reviewing a decision to deny a continuance is whether the circuit court erroneously exercised its discretion. *See State v. Pultz*, 206 Wis. 2d 112, 132, 556 N.W.2d 708 (1996). The reviewing court must balance the constitutional rights against the public policy in the prompt and efficient administration of justice. *Id.*; *Echols*, 175 Wis. 2d at 680.

5. Discretion Not Exercised

a. "We will uphold the trial court's decision unless the discretion was not exercised or there was no reasonable basis for the trial court's decision." *Wester v. Bruggink*, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994).

b. If the circuit court fails to provide reasoning for its evidentiary decision, the appellate court should independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. *Martindale v. Ripp*, 2001 WI 113, ¶ 29,

246 Wis. 2d 67, 629 N.W.2d 698.

Comment and Practice Tip. There is some tension between this directive, however, and the notion that the appellate court will not search the record unaided. Accordingly, if a circuit court fails to provide reasoning for its discretionary decision, appellate counsel is well advised to marshal, with appropriate references to the record, the record evidence that would sustain the exercise of discretion.

c. The appellate court should reverse and remand for the circuit court to exercise its discretion when the appellate court cannot discern from the record a basis for the decision. *Randall v. Randall*, 2000 WI App 98, ¶ 25, 235 Wis. 2d 1, 612 N.W.2d 737.

6. Circuit Court's Rationale

a. An erroneous exercise of discretion occurs when the circuit court does the following:

(1) Fails to consider and make a record of the relevant factors;

(2) Considers clearly irrelevant or improper factors; or

(3) Clearly gives too much weight to one factor.

See School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). It may also occur when the circuit court makes an error of law. *Id.*

b. A court's acquiescence in statement by counsel may provide the rationale. *Hagenkord v. State*, 100 Wis. 2d 452, 464, 302 N.W.2d 421 (1981).

c. Proper application of law

Misapplication or erroneous view of the law constitutes an erroneous exercise of discretion. *Sullivan v. Waukesha Cnty. (In re Sullivan)*, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998).

d. Factual basis in record

The circuit court erroneously exercises its discretion if its decision is grounded on a mistaken view of the evidence or if the evidence does not warrant the decision. *See Totsky v. Riteway Bus Serv., Inc.*, 220 Wis. 2d 889, 898, 584 N.W.2d 188 (Ct. App. 1998), *aff'd*, 2000 WI 29, 233 Wis. 2d 371, 607 N.W.2d 637.

A rationale based on factual mistakes or no facts in the record is an erroneous exercise of discretion. *See Schultz v. Darlington Mut. Ins. Co.*, 181 Wis. 2d 646, 659, 511 N.W.2d 879 (1994) (mistaken view of the facts); *State v. Hines*, 173 Wis. 2d 850, 863, 496 N.W.2d 720 (Ct. App. 1993) (no factual basis).

e. Search record for support

The appellate court will generally look for reasons to sustain the circuit court's discretionary decision. *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶ 8, 282 Wis. 2d 46, 698 N.W.2d 610. But it will not do so in all cases. *Argonaut Ins. Co. v. LIRC*, 132 Wis. 2d 385, 391, 392 N.W.2d 837 (Ct. App. 1986).

f. Appellate court need not agree with a decision to sustain it

"[A] trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." *State v. Eichman*, 155 Wis. 2d 552, 568, 456 N.W.2d 143 (1990) (citation omitted).

g. Right result, wrong reason

If the circuit court reaches the right result in admitting or excluding evidence but for the wrong reason, the appellate court must affirm. *State v. Adams (In re Commitment of Adams)*, 223 Wis. 2d 60, 74, 588 N.W.2d 536 (Ct. App. 1998).

h. Affirmance even if erroneous exercise

If a trial court considered improper facts or had a mistaken view of law, a reviewing court may affirm if "facts of record applied to the proper legal standard support the trial court's conclusion." *State v. Pittman*, 174 Wis. 2d 255, 268–69, 496 N.W.2d 74 (1993).

i. Wrong result, wrong reason

If the circuit court erred when setting maintenance, the appellate court should reverse and remand for the circuit court to properly exercise its discretion. *King v. King*, 224 Wis. 2d 235, 254, 590 N.W.2d 480 (1999).

j. Limited right to be wrong

"[T]o be invested with discretion means that the trial judge has what might be termed a limited right to be wrong in the view of the appellate court, without incurring reversal." Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 176 (1979), *quoted with approval in State v. McConnohie*, 113 Wis. 2d 362, 370, 334 N.W.2d 903 (1983).

k. When an exercise of discretion must be in writing

When a court modifies a placement order over the objection of either party, it must state its reasons for the modification in a written decision. Wis. Stat. § 767.451(5); *Landwehr v. Landwehr*, 2006 WI 64, ¶ 33, 291 Wis. 2d 49, 715 N.W.2d 180. The appellate court will uphold the modification if a written order substantially complies with this requirement. *Landwehr*, 2006 WI 64, ¶ 34, 291 Wis. 2d 49. The *Landwehr* court upheld the circuit court's decision because (1) the written order incorporated the "'findings of facts and conclusions of law on the record'"; (2) the court substantially explained its rationale on the record; and (3) the record supported that rationale. *Id.*

7. Summary Judgment Is Not Discretionary

In cases in which a party has demonstrated entitlement to summary judgment, the circuit court has no discretion to deny a summary-judgment motion. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987).

8. Wis. Stat. § 974.07(7) Reasonable Probability Determination Discretionary

A circuit court's determination as to whether it is reasonably probable that the defendant would not have been convicted had exculpatory DNA evidence been available is discretionary and will be upheld if the court reached a reasonable decision based on the facts of record and applicable law. *State v. Hudson*, 2004 WI App 99, ¶ 16, 273 Wis. 2d 707, 681 N.W.2d 316.

9. Jury Polling

How a judge resolves questions that arise during jury polling is a matter of the circuit court's discretion. *See State v. Raye*, 2005 WI 68, ¶¶ 15–16, 281 Wis. 2d 339, 697 N.W.2d 407.

10. Discretion and the Application of Statutes

Sometimes the intersection of a circuit court's discretionary authority and its application of statutes generates questions about the proper standard for reviewing a circuit court's action. Circuit court decisions that require the construction or application of a statute to a set of facts represent questions of law that the appellate courts review de novo, even when those decisions otherwise arise in contexts that typically involve the exercise of discretion, such as evidentiary rulings. *See, e.g., Deutsche Bank Nat'l Tr. Co. v. Olson*, 2016 WI App 14, ¶¶ 19–20, 366 Wis. 2d 720, 875 N.W.2d 649 (applying a de novo standard to review of a circuit court's decision admitting evidence under the Wis. Stat. § 908.03 exceptions to the hearsay rule) (citing *Palisades Collection LLC v. Kalal*, 2010 WI

App 38, ¶ 14, 324 Wis. 2d 180, 781 N.W.2d 503). But "[w]hen a statute grants a circuit court broad authority to act, without constraining the court's authority in any way," the appellate court reviews the circuit court's decision for an erroneous exercise of discretion. *Piette v. Horn*, 2015 WI App 41, ¶¶ 12–13, 362 Wis. 2d 484, 864 N.W.2d 900 (reviewing a circuit court's decision under Wis. Stat. § 860.13 to approve the sale of probate estate property to a personal representative).

One clear illustration of these concepts in action is a circuit court's decision to admit expert testimony. The court of appeals reviews de novo whether the circuit court applied the proper legal standard under Wis. Stat. § 907.02(1), but once the court of appeals is satisfied that the circuit court did so, it reviews the circuit court's admissibility decision under the more relaxed erroneous-exercise-of-discretion standard. *Vanderventer v. Hyundai Motor Am.*, 2022 WI App 56, ¶ 56, 405 Wis. 2d 481, 983 N.W.2d 1 (affirming circuit court's decisions to admit expert testimony of neurosurgeon and engineer despite objections as to reliability of their methodology) (review denied).

11. Declaratory Judgment

Whether to grant a declaratory judgment is addressed to the circuit court's discretion. *Great Lakes Beverages, LLC v. Wochinski*, 2017 WI App 13, ¶ 13, 373 Wis. 2d 649, 892 N.W.2d 333. But when the exercise of that discretion turns on a question of law, the appellate court conducts an independent review. *Id.*

B. Administrative Agency's Discretion

1. Administrative decisions are frequently reviewed using the same standards applied to discretionary judicial decisions. *See, e.g.*, *Hacker v. Department of Health & Soc. Servs.*, 197 Wis. 2d 441, 478, 541 N.W.2d 766 (1995) (quoting *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971), which had reviewed circuit court's use of discretion, for proper legal standard for reviewing discretionary determination by administrative body).

2. An agency's decision, not the circuit court's, is reviewed. *Beecher v. LIRC*, 2004 WI 88, ¶ 22, 273 Wis. 2d 136, 682 N.W.2d 29.

3. "We may not substitute our judgment for that of the [agency] on an issue of discretion." *Wisconsin Cent. Ltd. v. Public Serv. Comm'n of Wis.*, 170 Wis. 2d 558, 568, 490 N.W.2d 27 (Ct. App. 1992).

4. An agency's discretionary decision will be upheld so long as it is not arbitrary or capricious. *See Wisconsin Prof'l Police Ass'n v. Public Serv. Comm'n of Wis.*, 205 Wis. 2d 60, 74, 555 N.W.2d 179 (Ct. App. 1996).

C. Finding of Damages

1. Appellate courts review awards of compensatory damages under an erroneous-exercise-of-discretion standard. *See Allied Processors, Inc. v. Western Nat'l Mut. Ins. Co.*, 2001 WI App 129, ¶ 46, 246 Wis. 2d 579, 629 N.W.2d 329 (award of attorney fees).

2. Courts of appeal apply a de novo standard of review when ruling on the constitutionality of punitive damages awards. *Kimble v. Land Concepts, Inc.*, 2014 WI 21, ¶ 38, 353 Wis. 2d 377, 845 N.W.2d 395. "Both the judicial determination regarding whether punitive damages is a proper jury question and the size of the jury's punitive damages award are subject to review." *Id.* ¶ 44. The jury's decision whether to award damages is entitled to deference. *Id.* ¶ 38.

3. Three constitutional guideposts determine whether punitive damages are excessive: (1) the degree of reprehensibility of the conduct, (2) the disparity between the harm incurred and the award, and (3) the difference between the award and the civil or criminal penalties in comparable cases. *Id.* ¶¶ 46, 47 & n.18.

D. Supreme Court Review of Court of Appeals

The supreme court will not ordinarily review an exercise of discretion by the court of appeals. *Raz v. Brown*, 2003 WI 29, ¶ 14, 260 Wis. 2d 614, 660 N.W.2d 647. *But see State v. Johnson*, 149 Wis. 2d 418, 429, 439 N.W.2d 122 (1989) (when supreme court does review court of appeals' decision, it will uphold the decision so long as reasonable court could have made same decision). The court of appeals should explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate

judicial review. *State v. Scott*, 2018 WI 74, ¶ 40, 382 Wis. 2d 476, 914 N.W.2d 141, *abrogated on other grounds by State v. Green*, 2022 WI 30, 401 Wis. 2d 542, 973 N.W.2d 770. The court of appeals' failure to explain its exercise of discretion can itself constitute an erroneous exercise of discretion. *Scott*, 2018 WI 74, ¶ 41, 382 Wis. 2d 476. The supreme court, however, maintains a policy of noninterference regarding the court of appeals' authority to decide petitions seeking interlocutory review. *See State v. Jendusa*, 2021 WI 24, ¶¶ 19–22, 396 Wis. 2d 34, 955 N.W.2d 777 ("[I]t is not necessary for the court of appeals to explain why it denied a party leave to file an interlocutory appeal.").

VIII. Negative Standards of Review

A. Generally

There are many rules and doctrines by which an appellate court can decline to hear an issue. Most, if not all, of these rules and doctrines are aimed at ensuring proper judicial administration—i.e., a properly functioning system of full trial court procedures and decision-making, followed by appellate review of any alleged errors based on a complete record of what occurred leading up to those alleged errors. While these rules and doctrines have been called "negative standards of review," another way to view them is as overarching principles that make appellate courts reluctant to overturn a circuit court's decision, often regardless of the merits of any possible error.

B. Standing—Will the Court Hear the Party Seeking Review?

1. Question of Law

Whether a party has standing is a question of law subject to de novo review. *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 14, 300 Wis. 2d 290, 731 N.W.2d 240.

2. Liberal Application

"The law of standing should not be construed narrowly or restrictively." *Carla S. v. Frank B. (In re Guardianship & Protective Placement of Carl F.S.)*, 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 626 N.W.2d 330.

3. Nonjurisdictional

Standing is a matter of judicial policy and is not a jurisdictional prerequisite in this state, *Carla S. v. Frank B. (In re Guardianship & Protective Placement of Carl F.S.)*, 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 626 N.W.2d 330, except in a Wis. Stat. ch. 227 administrative review proceeding, *Wisconsin Hosp. Ass'n v. Natural Res. Bd.*, 156 Wis. 2d 688, 700, 457 N.W.2d 879 (Ct. App. 1990).

4. Sua Sponte Review of Standing

The appellate court must sua sponte raise and determine standing to appeal. *Snopek v. Lakeland Med. Ctr.*, 215 Wis. 2d 539, 544, 573 N.W.2d 213 (Ct. App. 1997), *rev'd on other grounds*, 223 Wis. 2d 288, 588 N.W.2d 19 (1999).

C. Exhaustion of Administrative Remedies

1. Denial of Relief

As a rule, judicial relief is denied unless the parties have exhausted their administrative remedies. *See Hermann v. Town of Delavan*, 215 Wis. 2d 370, 383, 572 N.W.2d 855 (1998). This is a rule of "policy, convenience and discretion." *Id.*

2. Doctrine Is Discretionary

The court should balance the litigant's need for review, the agency's interest in preventing review, and the public's interest in sound administration of justice. *Town of Menasha v. B & B Race Car Eng'g*, 172 Wis. 2d 419, 425, 493 N.W.2d 250 (Ct. App. 1992). The doctrine provides state agencies with the opportunity to correct their own errors and prevent premature judicial incursions into agency activities, promotes judicial efficiency, and often allows conflicts to be resolved without resort to litigation. *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶ 8, 242 Wis. 2d 94, 624 N.W.2d 150.

Caveat. A plaintiff need not exhaust administrative remedies before bringing a 42 U.S.C. § 1983 action in state court. *See Casteel v. Vaade*, 167 Wis. 2d 1, 5, 481 N.W.2d 476 (1992).

D. Primary Jurisdiction of Administrative Agency

1. Agency's Expertise Considered

Agencies have a special role in fact-finding and policy-making in their fields of expertise. *See Association of Career Emps. v. Klauser*, 195 Wis. 2d 602, 611, 536 N.W.2d 478 (Ct. App. 1995). If those considerations are paramount, agencies should be given first review unless there is a valid reason for the court to intervene. *Id.*

2. Doctrine Is Discretionary

Application of the primary-jurisdiction rule is discretionary with circuit court. *Association of Career Emps. v. Klauser*, 195 Wis. 2d 602, 611, 536 N.W.2d 478 (Ct. App. 1995).

3. Difference Between Exhaustion and Primary Jurisdiction

Primary-jurisdiction rule applies when no agency proceedings have been instituted and the agency and the courts have concurrent jurisdiction. Exhaustion is required when proceedings have been commenced before the agency. *See Association of Career Emps. v. Klauser*, 195 Wis. 2d 602, 611–12, 536 N.W.2d 478 (Ct. App. 1995).

E. Postconviction Procedures

An appellant need not file a postconviction motion in the circuit court before appeal if the grounds are sufficiency of the evidence or issues previously raised in the circuit court. Wis. Stat. § 974.02(2).

A postconviction motion under Wis. Stat. § 974.06 may be filed after the time for appeal or for a motion under Wis. Stat. § 974.02 has expired. Wis. Stat. § 974.06(1). All available grounds for relief must be raised in the original, supplemental, or amended motion. Wis. Stat. § 974.06(4). Grounds not raised will not later be heard without "sufficient reason" for the failure to earlier raise them. *Id.* However, "[a] defendant need not provide a 'sufficient reason' for a claim cognizable under Wis. Stat. § 974.06 if the defendant did not file a motion under Wis. Stat. § 974.02 or a direct appeal." *State v. Romero-Georgana*, 2014 WI 83, ¶ 35, 360 Wis. 2d 522, 849 N.W.2d 668.

Also, the supreme court has announced that a defendant who asserts that postconviction or appellate counsel was ineffective for failing to raise grounds in a postconviction motion or on appeal must show that the grounds in question are "clearly stronger" than the grounds that postconviction or appellate counsel did assert. *Id.* ¶¶ 44–46. For a claim of ineffective assistance of appellate counsel, the "clearly stronger" comparison will arise in the court of appeals in the first instance. *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992) (concluding that claim of ineffective assistance of appellate counsel must be raised by habeas corpus in court of appeals or supreme court).

A claim of ineffective assistance of postconviction counsel must be addressed first to the circuit court, *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 683–84, 556 N.W.2d 136 (Ct. App. 1996), which may then result in an appeal to the court of appeals.

Comment. The supreme court, in *Romero-Georgana*, did not explain, however, which standard of review an appellate court should apply to a circuit court's determination whether grounds in a successive postconviction motion are "clearly stronger" than

the grounds that were raised. Courts have appeared to treat the issue as a question of law, which is consistent with the standard governing a defendant's entitlement to an evidentiary hearing. *Cf. State v. Starks*, 2013 WI 69, ¶ 73, 349 Wis. 2d 274, 833 N.W.2d 146 (holding that because the claims the defendant raised were either "unsubstantiated, unpersuasive, or previously adjudicated," they were in no way "clearly stronger" than the arguments raised by appellate counsel on direct review), *overruled in part on other grounds by State ex rel. Warren v. Meisner*, 2020 WI 55, ¶¶ 5, 37–38, 43, 392 Wis. 2d 1, 944 N.W.2d 588.

F. Mootness

A reviewing court will usually decline to decide moot issues. *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425.

A matter is moot if a determination is sought that cannot have a practical effect on an existing controversy. *Id.*

Exceptions to rule of dismissal for mootness include whether the issue has great public importance, a statute's constitutionality is involved, or a decision is needed to guide the circuit courts. *Id.* An exception to this dismissal rule may also be appropriate when the issue is likely of repetition and yet evades review because it typically is resolved before completion of appellate process. *Id.*

G. Hypothetical or Future Facts

The appellate court will not decide an issue based on such facts because such a claim is not ripe for adjudication. *State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998).

Whether an action is ripe (i.e., the facts are sufficiently developed) is a question of law. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 32, 309 Wis. 2d 365, 749 N.W.2d 211.

H. Abstract Legal Principles

The appellate court will not decide abstract legal principles. *Weber v. Town of Saukville*, 197 Wis. 2d 830, 840, 541 N.W.2d 221 (Ct. App. 1995), *aff'd on other grounds*, 209 Wis. 2d 214, 562 N.W.2d 412 (1997).

I. No Justiciable Controversy

A court will not decide an action unless there is a justiciable controversy. *Wisconsin Educ. Ass'n Council v. State Elections Bd.*, 2000 WI App 89, ¶ 9, 234 Wis. 2d 349, 610 N.W.2d 108.

The political-question doctrine is a close relative of this rule. Separation-of-powers principles dictate that political issues are best left to a nonjudicial branch of the government. Under such circumstances, courts (including appellate courts) typically decline to intervene. *See Mills v. Vilas Cnty. Bd. of Adjustments*, 2003 WI App 66, ¶ 17, 261 Wis. 2d 598, 660 N.W.2d 705.

J. No Retrial on Appeal

State v. Hirsch, 2002 WI App 8, ¶ 32, 249 Wis. 2d 757, 640 N.W.2d 140; *Holz v. Busy Bees Contracting, Inc.*, 223 Wis. 2d 598, 606, 589 N.W.2d 633 (Ct. App. 1998).

K. Issue Raised for First Time on Appeal

1. The Forfeiture Rule

"[S]ome rights are forfeited when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review." *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. This forfeiture rule (1) ensures that the circuit court can avoid errors (and appeals) and that the parties and court have notice and opportunity to address the error, (2) promotes attorney diligence, and (3) discourages "sandbagging" opposing counsel. *Id.*

Although courts sometimes use the word "waiver" to refer to forfeiture, "waiver" is something very different: the knowing, voluntary, and intelligent relinquishment of a known right. *Id.* ¶¶ 31–32. Waiver applies to certain rights that are so fundamental to a fair trial that they can only be expressly and intentionally waived. *Id.* ¶ 31; *see also infra* VIII.GG.

Whether a particular right is subject to forfeiture or waiver analysis depends on "'the constitutional or statutory importance of the right, balanced against the procedural efficiency in requiring immediate final determination of the right.'" *State v. Pinno*, 2014 WI 74, ¶ 57, 356 Wis. 2d 106, 850 N.W.2d 207 (quoting *State v. Soto*, 2012 WI 93, ¶ 38, 343 Wis. 2d 43, 817 N.W.2d 848). The structural nature of an error does not necessarily exempt the defendant from the objection requirement. *Id.* ¶ 54 (citing *Freytag v. Commissioner*, 501 U.S. 868, 893 (1991) (Scalia, J., concurring)).

2. Not Raised Before Circuit Court

a. General Rule—Not Reviewed

Appellate court will generally not review an issue raised for the first time on appeal, but this rule of judicial administration does not affect the power of an appellate court to deal with the issue. *See Jackson v. Benson*, 218 Wis. 2d 835, 901, 578 N.W.2d 602 (1998); *State v. Gaulke*, 177 Wis. 2d 789, 793–94, 503 N.W.2d 330 (Ct. App. 1993).

b. Rationale for General Rule

"The reason for the rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court." *Cappon v. O'Day*, 165 Wis. 486, 490–91, 162 N.W. 655 (1917).

"Rules such as these serve critical purposes: the provision of adequate notice to adversaries (and the court) of the matters that are at issue; the allocation of decisions to the appropriate body; the promotion of focused consideration of particular questions at different times, when the pertinent evidence and argumentation can be mustered; and the avoidance of wasteful proceedings by requiring prompt consideration of issues upon whose resolution further matters (or the continuation of the proceeding at all) depend. It is hard to imagine an effective procedural system lacking such rules of the road." Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1134–35 (1986).

When an issue involves a question of law, has been briefed by opposing parties, and is of sufficient public interest to merit a decision, the supreme court has discretion to address the issue. *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 52, 245 Wis. 2d 772, 629 N.W.2d 727.

c. Rule Applies to New Issues, Not New Arguments

New argument is permitted on an issue raised in the court below. *State v. Weber*, 164 Wis. 2d 788, 791, 476 N.W.2d 867 (1991) ("Once an issue is raised in a petition for review, any argument addressing the issue may be asserted in the brief of either party or utilized by this court."); *Harvest Sav. Bank v. ROI Invs.*, 209 Wis. 2d 586, 596, 563 N.W.2d 579 (Ct. App. 1997).

For definitions of argument and issue, see *Weber*, 164 Wis. 2d at 789 n.2.

d. Rule Inapplicable to Respondent

State v. Baeza, 156 Wis. 2d 651, 657–58, 457 N.W.2d 522 (Ct. App. 1990), sometimes overlooked or ignored by appellants, stated that the forfeiture rule rarely applies to party that prevailed in the circuit court and is acting as the respondent in an appeal. Indeed, a respondent may "raise any defense to an appeal even if that defense is inconsistent with the stand taken at trial." *State v. Baeza*, 156 Wis. 2d 651, 657–58, 457 N.W.2d 522 (Ct. App. 1990). "[A]n appellate court is concerned with whether a court decision being reviewed is correct, rather than with the reasoning employed by the circuit court. If the holding is correct, it should be

sustained, and this court may do so on a theory or on reasoning not presented to the trial court." *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

Furthermore, a respondent may raise an issue without filing a cross-appeal when all that is sought is the raising of an error that, if corrected, would sustain the judgment. *Ahrens v. Town of Fulton*, 2000 WI App 268, ¶ 9 n.3, 240 Wis. 2d 124, 621 N.W.2d 643, *aff'd*, 2002 WI 29, 251 Wis. 2d 135, 641 N.W.2d 423.

The respondent's ability to argue any grounds that would sustain the judgment below has limitations. For example, as a matter of due process, an appellate court cannot uphold a conviction on a charge neither alleged in an indictment nor asserted at trial. *Dunn v. United States*, 442 U.S. 100, 106 (1979).

e. Rulings and Orders, Failure to Object

Failure to object before a ruling or order is made forfeits the right to object to the error. Wis. Stat. § 805.11(1).

Party objecting must specify grounds. Wis. Stat. § 805.11(2).

f. Evidence: Failure to Object or Make Offer of Proof

Failure to object to evidence offered ordinarily forfeits a claim of error. Wis. Stat. § 901.03(1)(a).

Failure to offer to prove after evidence is excluded ordinarily forfeits a claim of error. Wis. Stat. § 901.03(1)(b).

g. Instructions and Form of Verdict, Failure to Object at Instructions Conference

Failure to object at instruction conference forfeits the right to object to any error in proposed instructions or verdict. Wis. Stat. § 805.13(3); *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988). The court of appeals has "no power" to review unobjected-to instructional error. *Schumacher*, 144 Wis. 2d at 409. But the court may reach the forfeited issue under its discretionary power under Wis. Stat. § 752.35 to reverse if the real controversy was not fully tried or in the interest of justice. *Vollmer v. Luety*, 156 Wis. 2d 1, 17–19, 456 N.W.2d 797 (1990). *But see State v. McKellips*, 2016 WI 51, ¶¶ 49, 51–52, 369 Wis. 2d 437, 881 N.W.2d 258 (concluding court of appeals erred in applying Wis. Stat. § 752.35 to reverse a conviction on the basis of a poorly worded jury instruction).

When a jury heard erroneous instructions, the reviewing court applies the harmless-error doctrine and determines whether it is clear beyond a reasonable doubt that a properly instructed, rational jury would have found the defendant guilty. *State v. Beamon*, 2013 WI 47, ¶¶ 3, 46 & n.6, 347 Wis. 2d 559, 830 N.W.2d 681.

If an objection is made but not on the record, the alleged error is not preserved for appeal, even if the error goes to substance. *Air Wis., Inc. v. North Cent. Airlines, Inc.*, 98 Wis. 2d 301, 311–12, 316, 296 N.W.2d 749 (1980).

For a discussion of *Schumacher*, *Vollmer*, and *Air Wisconsin*, see *Steinberg v. Jensen*, 204 Wis. 2d 115, 122, 553 N.W.2d 820 (Ct. App. 1996).

h. New Trial—Failure to Move

See General Tel. Co. of Wis. v. Auto-Owners Ins. Co., 140 Wis. 2d 10, 17–18, 409 N.W.2d 133 (Ct. App. 1987) (concluding that trial court cannot, even on its own motion, grant a new trial absent (1) a motion made within statutory time limits, or (2) an order or judgment obtained by fraud or similar violation of equity).

i. Subject-Matter Jurisdiction and Competency

Appellate court must consider subject-matter jurisdiction. *Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 157, 605 N.W.2d 210 (Ct. App. 1999). Because circuit courts are constitutionally vested with broad subject-matter jurisdiction, issues most often revolve around a circuit court's competency. Competency is a narrower concept than subject-matter jurisdiction and refers to a

circuit court's ability to exercise its authority in a particular case (for example, by the parties' compliance with statutory time limits). *See Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶ 8–14, 273 Wis. 2d 76, 681 N.W.2d 190. Unlike subject-matter jurisdiction, a challenge to a court's competency is deemed forfeited if not first raised in the circuit court, subject to the inherent authority of the reviewing court to disregard the forfeiture and address the merits or to engage in a discretionary review. *Id.* ¶ 27; *see also City of Eau Claire v. Booth*, 2016 WI 65, ¶ 25, 370 Wis. 2d 595, 882 N.W.2d 738 (holding that defendant in successive-offense operating while intoxicated (OWI) case forfeited her ability to challenge, on competency grounds, her mischarged 1992 OWI by not raising that challenge until 22 years later).

Caution. Older cases often conflated subject-matter jurisdiction and competency. *See, e.g.*, *Ocasio v. Froedtert Mem'l Lutheran Hosp.*, 2001 WI App 264, ¶ 28, 248 Wis. 2d 932, 637 N.W.2d 459, *rev'd on other grounds*, 2002 WI 89, ¶ 11 n.5, 254 Wis. 2d 367, 646 N.W.2d 381.

j. Constitutional Issue

A court may consider a constitutional issue for first time on appeal if it is in the best interests of justice to do so, the parties have had an opportunity to brief the issue, and the relevant facts are undisputed. *W.W.W. v. M.C.S. (In re Paternity of C.A.S.)*, 161 Wis. 2d 1015, 1025 n.7, 468 N.W.2d 719 (1991).

k. Objection to Constitutional Error Not Necessarily Forfeited

Only "unusual circumstances" justify appellate relief when constitutional issues are raised for the first time on appeal, *State v. Zivcic*, 229 Wis. 2d 119, 125, 598 N.W.2d 565 (Ct. App. 1999), for example, when a defendant has been convicted of a crime based on a statute later declared unconstitutional, *State v. Benzel*, 220 Wis. 2d 588, 590–92, 583 N.W.2d 434 (Ct. App. 1998), or when the error complained of affects the proper relationship between the circuit court and the jury, *see State v. Raye*, 2005 WI 68, ¶¶ 26, 28, 281 Wis. 2d 339, 697 N.W.2d 407 (jury polling). *But see State v. Pinno*, 2014 WI 74, ¶ 63, 356 Wis. 2d 106, 850 N.W.2d 207 (holding that right to public trial, though a structural error, "may be forfeited when a defendant knows that the judge has ordered the public to leave the courtroom but does not object"); *State v. Bush (In re Commitment of Bush)*, 2005 WI 103, ¶¶ 17–19, 283 Wis. 2d 90, 699 N.W.2d 80 (stating that facial challenge to statute went to subject-matter jurisdiction and therefore could not be forfeited).

l. Manifest Error

Failure to bring a motion to correct a manifest error constitutes a forfeiture of the right to object. *Schinner v. Schinner*, 143 Wis. 2d 81, 92–93, 420 N.W.2d 381 (Ct. App. 1988). "'[M]anifest error' contemplates that self-evident kind of error which results from ordinary human failings due to oversight, omission, or miscalculation. It is the type of error which tends to immediately reveal itself as such to reasonable legal minds. It does not, and should not, embrace those kinds of alleged errors which lend themselves to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy." *Id.*

m. Other Circumstances

Appellate courts may also, in their discretion, review issues raised for the first time on appeal (1) when a question of law is presented for the first time on appeal, and it is not dependent on the facts that might have been presented below, *Estate of Hegarty v. Beauchaine*, 2001 WI App 300, ¶ 12, 249 Wis. 2d 142, 638 N.W.2d 355; (2) in cases in which it would have been futile to expect the circuit court to rule favorably, *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 30, 115 N.W.2d 618 (1962*), superseded on other grounds by statute*, ch. 198, Laws of 1963 (now codified at Wis. Stat. § 893.80(4)); and (3) in cases involving matters of public interest when the issue is one of law and the parties have briefed the issue, *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990).

3. Not Raised Before Court of Appeals

Although a party may make a new argument in the supreme court to support affirmance of the court of appeals, "a party cannot raise a new issue in this court that will cause a modification of the decision of the court of appeals without filing a petition for review or cross review." *Ranes v. American Fam. Mut. Ins. Co.*, 219 Wis. 2d 49, 54 n.4, 580 N.W.2d 197 (1998).

4. Not Raised Before Administrative Agency

a. Generally

An issue not raised before the agency generally cannot be raised on judicial review. *See Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, ¶ 108, 278 Wis. 2d 111, 692 N.W.2d 572.

b. Constitutional Issue

A constitutional issue must be raised, and the record developed, before the agency, even if the agency has no power to decide the issue. *See Bidstrup v. Department of Health & Fam. Servs.*, 2001 WI App 171, ¶ 22, 247 Wis. 2d 27, 632 N.W.2d 866.

L. Issue Raised but Not Argued

An issue raised in the circuit court but not briefed or argued is deemed abandoned. *State v. Johnson*, 184 Wis. 2d 324, 344–45, 516 N.W.2d 463 (Ct. App. 1994). "[F]or purposes of trial court proceedings, "a party must raise and argue an issue with enough prominence to signal to the trial court that it is being called upon to address an issue and make a ruling." *Id.*

M. Issue Raised but Inadequately Briefed

The supreme court and the court of appeals may decline to review an issue that was inadequately briefed. *See Teague v. Schimel*, 2017 WI 56, ¶ 25 n.18, 375 Wis. 2d 458, 896 N.W.2d 286; *Roehl v. American Fam. Mut. Ins. Co.*, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998); *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

N. Issue Raised but Another Issue Dispositive

If a decision on one point disposes of the appeal, the appellate court need not decide other issues raised. *Turner v. Taylor*, 2003 WI App 256, ¶ 1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716; *State v. Jipson*, 2003 WI App 222, ¶ 17 n.5, 267 Wis. 2d 467, 671 N.W.2d 18.

But court may address other issues in the interest of judicial economy if the issues are likely to arise at a second trial. *See State v. Temby*, 108 Wis. 2d 521, 527, 322 N.W.2d 522 (Ct. App. 1982).

O. Issue Raised by Motion in Limine

The making of a motion preserves the right to appeal the ruling on the motion without objecting at trial, but if the appellant opposed a motion by the other party, the appellant is limited to the same arguments on appeal that the appellant made in response to the pretrial motion. *See State v. Bustamante*, 201 Wis. 2d 562, 571, 549 N.W.2d 746 (Ct. App. 1996).

P. Narrowest Possible Ground—General Rule

Cases should be decided on the narrowest possible ground. *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis. 2d 300, 786 N.W.2d 15; *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997), *overruled on other grounds by State v. Morford*, 2004 WI 5, 268 Wis. 2d 300, 674 N.W.2d 349.

The court will not reach constitutional issues when the resolution of other issues disposes of the appeal. *Castillo*, 213 Wis. 2d at 492.

Q. Narrowest Possible Ground—Exceptions to Rule

If appellate court concludes that a new trial is required for criminal defendant on other grounds, double jeopardy considerations require court to review a claim that the conviction is not supported by sufficient evidence. *See State v. Rushing*, 197 Wis. 2d 631, 641, 541 N.W.2d 155 (Ct. App. 1995) (citing *State v. Ivy*, 119 Wis. 2d 591, 609–10, 350 N.W.2d 622 (1984)).

The court may also decide a recurring question that is technically moot but that will otherwise avoid review. *Milwaukee Cnty. v. Delores M. (In re Delores M.)*, 217 Wis. 2d 69, 76, 577 N.W.2d 371 (Ct. App. 1998).

R. Court Not a Performing Bear

"An appellate court is not a performing bear, required to dance to each and every tune played on an appeal. Here appellant raises twenty-nine challenges to a judgment of conviction. However, we find the challenges to fit into five categories and will discuss each category. Any of the twenty-nine issues raised and not discussed in any of the five categories can be deemed to lack sufficient merit or importance to warrant individual attention." *County of Fond du Lac v. Derksen*, 2002 WI App 160, ¶ 4, 256 Wis. 2d 490, 647 N.W.2d 922 (citation omitted).

S. Constitutional Issue Raised but Not Adequately Argued

Constitutional points raised but not argued will not be reviewed. *State v. Scherreiks*, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989). "Simply to label a claimed error as constitutional does not make it so, and we need not decide the validity of constitutional claims broadly stated but never specifically argued." *Id.* (citation omitted).

T. Strategic Choice at Trial

A deliberate choice of strategy is binding on a party and an appellate claim of error based on the party's own choice will not be considered by a reviewing tribunal, even if the chosen strategy backfires. *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, ¶ 80, 264 Wis. 2d 200, 664 N.W.2d 651 ("Failed trial strategy is not grounds for remand."), *abrogated on other grounds by Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21; *State v. Hyndman*, 170 Wis. 2d 198, 209, 488 N.W.2d 111 (Ct. App. 1992) (citing *State v. McDonald*, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971)).

U. Invited Error

"We will not review invited error," as when a party sought a psychological evaluation, the court ordered it, and the party then claimed that the court erred. *Shawn B.N. v. State* (*In the Int. of Shawn B.N.)*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992).

V. Opponent's Arguments Not Refuted

Respondent cannot complain if propositions of appellant are taken as confessed when the respondent does not undertake to refute them. *See Raz v. Brown*, 2003 WI 29, ¶ 25, 260 Wis. 2d 614, 660 N.W.2d 647 (citation omitted).

W. Appellant First Discusses Issue in Reply Brief

If appellant fails to discuss an alleged error in its main brief, appellant may not do so in the reply brief. *State v. Marquardt*, 2001 WI App 219, ¶ 14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188.

X. Error Affecting Nonappealing Party

Error adversely affecting only a nonappealing party will not be considered. *Cooper v. City of Milwaukee*, 97 Wis. 458, 466, 72 N.W. 1130 (1897).

Y. No Legal Authority Cited

Arguments unsupported by references to legal authority will not be considered. *State v. Lindell*, 2000 WI App 180, ¶ 23 n.8, 238 Wis. 2d 422, 617 N.W.2d 500, *aff'd*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223.

Z. No Transcript

Lack of transcript limits review to those parts of the record available to the appellate court. *Jocius v. Jocius*, 218 Wis. 2d 103, 119, 580 N.W.2d 708 (Ct. App. 1998).

AA. Affidavits Cannot Supplement Record

Court will not consider affidavits that are not part of the record. *State v. Janssen*, 219 Wis. 2d 362, 366 n.3, 580 N.W.2d 260 (1998). *But see Fringer v. Venema*, 26 Wis. 2d 366, 376, 132 N.W.2d 565 (1965) (affidavit disclosing source of fact circuit court judicially noticed accepted on appeal), *modified on other grounds on reh'g*, 26 Wis. 2d 366, 133 N.W.2d 809 (1965).

BB. Facts Outside the Record

Assertions of a fact that are not part of the record ordinarily will not be considered. *Parr v. Milwaukee Bldg. & Constr. Trades*, 177 Wis. 2d 140, 145 n.4, 501 N.W.2d 858 (Ct. App. 1993). However, the *Parr* court considered deposition testimony not in the record when both parties cited it, it was appended to a brief, and the circuit court considered it in making its decision. *Id.*

CC. No Record References

The reviewing court need not sift the record for facts that support counsel's contention when counsel provides no record citations for supporting facts. *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶ 6, 239 Wis. 2d 406, 620 N.W.2d 463.

DD. Frivolous or Trivial Issues

Court will not consider trivial issues, *see Town of Delavan v. City of Delavan*, 168 Wis. 2d 566, 570 & n.4, 484 N.W.2d 343 (Ct. App. 1992) (rejecting state's invitation to apply the principle of de minimis non curat lex in the particular case), *rev'd on other grounds*, 176 Wis. 2d 516, 530–31, 500 N.W.2d 268 (1993) (applying principle and stating issue was trivial), unless the "trivial" issue affects a fundamental right, *Cresci v. State*, 89 Wis. 2d 495, 506, 278 N.W.2d 850 (1979).

Caution. Attorneys should take care to note the difference between commencing an action that a person knows or should know is devoid of legal or factual weight and *continuing* an action after certain facts come to light that make the action meritless. The supreme court has treated a circuit court's determination that an action was commenced frivolously as a mixed question involving factual findings and the discretionary decision based on those findings. The supreme court has treated a circuit court's determination that an action was continued frivolously as a mixed question of fact and law. Whether these standards will continue to apply in the future is an open question. *Donohoo v. Action Wis., Inc.*, 2008 WI 56, ¶¶ 34–35 & n.7, 309 Wis. 2d 704, 750 N.W.2d 739 (noting that the legislature patterned its re-creation of Wis. Stat. § 802.05 after Fed. R. Civ. P. 11, which uses only the discretionary standard); *see also Keller v. Patterson*, 2012 WI App 78, ¶¶ 21–22 & n.10, 343 Wis. 2d 569, 819 N.W.2d 841 (discussing *Storms v. Action Wis. Inc.*, 2008 WI 56, ¶¶ 33–35, 309 Wis. 2d 704, 750 N.W.2d 739, and noting that "the standard of review for frivolously continued actions may now be more deferential to the trial court").

EE. Law Conceded on Stipulation

The appellate court is not bound by a party's concession on a question of law. *State v. Anderson*, 2014 WI 93, ¶ 19, 357 Wis. 2d 337, 851 N.W.2d 760; *Wisconsin Dairies Coop. v. Citizens Bank & Tr.*, 160 Wis. 2d 758, 763 n.1, 467 N.W.2d 124 (1991).

FF. Confessed Error

Court is not bound by state's confession of error on a question of law. *State v. Mares*, 149 Wis. 2d 519, 530 n.4, 439 N.W.2d 146 (Ct. App. 1989); *see also State v. Gomaz*, 141 Wis. 2d 302, 307–08, 414 N.W.2d 626 (1987).

GG. Waiver

A party may contract to waive the right to appeal, but such waiver must be clearly established by the agreement and cannot be inferred. *Ceria M. Travis Acad., Inc. v. Evers*, 2016 WI App 86, ¶ 26, 372 Wis. 2d 423, 887 N.W.2d 904; *cf. supra* VIII.K.1.

IX. Sua Sponte Consideration of Issues Not Raised

A. Generally

There are two theories regarding the proper role of the trial or appellate court as it pertains to the raising of issues sua sponte. *State v. Holmes*, 106 Wis. 2d 31, 39, 315 N.W.2d 703 (1982). One theory is that the litigants should control the course of the lawsuit and determine the nature of the questions presented to the courts. *Id.* The other theory is that the courts have the responsibility to decide cases in accordance with the law, unconstrained by the failure of counsel to identify an issue. *Id.* Because courts are necessarily constrained by a heavy workload and the amount of resources available to them, and because the litigants are most familiar with the case and have an interest in presenting the strongest case possible, Wisconsin courts are generally content to allow the parties to determine the nature of the questions presented. *See id.* At the same time, however, a court must necessarily do justice between the parties, and "[a]lthough theory and practice militate against a court's sua sponte raising legal issues, it is well recognized that courts may sua sponte consider legal issues not raised by the parties." *Id.* at 39–40. A court should, however, give notice to the litigants that it is considering the issue and provide them with an opportunity to argue the issue. *Id.* at 40–41.

B. Appellate Court Not Bound by, but Ordinarily Should Not Go Beyond, Issues as Framed

1. "The court … decided to re-examine the doctrines of contribution between joint tortfeasors and of gross negligence, and requested briefs on the following questions: …." *Bielski v. Schulze*, 16 Wis. 2d 1, 6, 114 N.W.2d 105 (1962): *see also Saenz v. Murphy*, 162 Wis. 2d 54, 57 n.2, 469 N.W.2d 611 (1991) ("[T]his court is not bound by the issues as they are framed by the parties."), *overruled on other grounds by State ex rel. Anderson-El v. Cooke*, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821, and *Casteel v. Vaade*, 167 Wis. 2d 1, 481 N.W.2d 476 (1992).

2. "The agreement of the parties on questions of law does not generally bind an appellate court." *State v. Olson*, 127 Wis. 2d 412, 419, 380 N.W.2d 375 (Ct. App. 1985).

3. But "appellate courts need not and ordinarily will not consider or decide issues which are not specifically raised on appeal," *Waushara Cnty. v. Graf*, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992), not even to protect non-incarcerated, self-represented litigants from inadvertently forfeiting their rights, *Id.* at 451–52.

4. Harmless error in criminal case is probably an exception to prohibition on sua sponte consideration of issues. *See Rudolph v. State*, 78 Wis. 2d 435, 447, 254 N.W.2d 471 (1977) (rejecting as harmless state's confession of error and stating that court has duty to review record before overturning a conviction, even when state has confessed error).

C. Jurisdiction

1. Nonappealable Orders

"It is the duty of this court, notwithstanding no issue has been raised by counsel, to take notice of a point which goes to the jurisdiction of this court on appeal and to dismiss the appeal on its own motion, if the order of the trial court is not an appealable order." *Mack v. Joint Sch. Dist. No. 3*, 92 Wis. 2d 476, 484, 285 N.W.2d 604 (1979) (citations omitted).

2. Subject-Matter Jurisdiction and Competency

A circuit court's subject-matter jurisdiction is plenary and constitutionally based, such that noncompliance with statutory requirements governing the invocation of such jurisdiction in a particular case "is not 'jurisdictional' in that it does not negate the court's subject matter jurisdiction." *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 9, 273 Wis. 2d 76, 681 N.W.2d 190. "Rather, a failure to comply with a statutory mandate pertaining to the exercise of subject matter jurisdiction may result in a loss of the circuit court's competency to adjudicate the particular case before the court." *Id.*; *see also infra* VIII.K.2.i.

3. Constitutionality of Statute or Ordinance

Challenge to statute or ordinance on grounds of vagueness raised subject-matter jurisdictional issue that court must consider sua sponte. *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 532, 538–39, 280 N.W.2d 316 (1979).

4. Personal Jurisdiction

Court may inquire as to personal jurisdiction even if point is not raised in circuit court or on appeal. *See Kochel v. Hartford Accident & Indem. Co.*, 66 Wis. 2d 405, 415, 225 N.W.2d 604 (1975).

D. Harmless Error, *see infra* XI.

E. Additional Briefing Desirable

The Wisconsin Supreme Court has urged "courts to exercise caution when determining an issue sua sponte without the assistance of supplemental briefs and to ask for briefs unless the matter is quite clear." *Bartus v. Department of Health & Soc. Servs.*, 176 Wis. 2d 1063, 1073, 501 N.W.2d 419 (1993).

X. Discretionary Relief on Appeal in Interests of Justice

A. Statutory Basis

The supreme court or court of appeals may reverse, direct entry of proper judgment, or order a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Wis. Stat. §§ 751.06, 752.35. The powers granted the two courts by the two statutes are identical. *Vollmer v. Luety*, 156 Wis. 2d 1, 17–18, 456 N.W.2d 797 (1990). Thus, precedent interpreting one statute is authoritative under the other statute.

B. Error Need Not Be Preserved or Even Raised on Appeal

1. Relief is available "regardless of whether the proper motion or objection appears in the record." Wis. Stat. §§ 751.06, 752.35.

2. The error need not be raised on appeal. *See Gamroth v. Village of Jackson*, 215 Wis. 2d 251, 261–65, 571 N.W.2d 917 (Ct. App. 1997).

C. Appellate Court Must Have Adequate Record

In the absence of a transcript of testimony, appellate court cannot obey statutory direction to exercise its discretion on an independent review of the record. *Manly v. State Farm Fire & Cas. Co.*, 139 Wis. 2d 249, 256, 407 N.W.2d 306 (Ct. App. 1987).

D. Real Controversy Not Fully Tried—Examples

1. Unobjected-to erroneous jury instruction or verdict form. *Vollmer v. Luety*, 156 Wis. 2d 1, 9, 22, 456 N.W.2d 797 (1990).

2. Specific verdict asked if the defendant's negligence was "the" cause of injuries rather than "a" cause. *Clark v. Leisure Vehicles, Inc.*, 96 Wis. 2d 607, 619–20, 292 N.W.2d 630 (1980).

3. Issue of ownership of land not fully tried in construction-lien foreclosure. *R.W. Hernan Plumbing Corp. v. Anchor Sav. & Loan Ass'n*, 104 Wis. 2d 532, 533, 537–38, 312 N.W.2d 745 (1981).

4. Jury heard evidence it should not have heard or did not hear evidence it should have heard. *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

Caveat. Read *Wyss* with *Vollmer*, 156 Wis. 2d at 19–21.

Example. Identification of a perpetrator was not fully tried when DNA evidence was withheld from the jury. *State v. Hicks*, 202 Wis. 2d 150, 152, 159–61, 549 N.W.2d 435 (1996).

E. Justice Miscarried

Appellate court must be convinced that a different result is likely on retrial. *State v. Wyss*, 124 Wis. 2d 681, 736, 370 N.W.2d 745 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Reversals in the interest of justice should be granted only in exceptional cases, and appellate courts erroneously exercise their discretion in this regard if they reverse only based on a de novo review of the evidence without applying the clearly erroneous standard for reviewing factual findings. *State v. Kucharski*, 2015 WI 64, ¶¶ 23, 36, 46, 363 Wis. 2d 658, 866 N.W.2d 697.

XI. Harmless Error

A. General Statutory Basis

No relief is granted on appeal "unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial." Wis. Stat. § 805.18(2).

B. *Dyess* Rule

1. An error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the result in the case. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The harmless-error inquiry presents a question of law. *State v. Stietz*, 2017 WI 58, ¶ 62, 375 Wis. 2d 572, 895 N.W.2d 796.

The *Dyess* harmless-error test continues to generate controversy. In 2001, the Wisconsin Supreme Court issued five decisions, generating concurring and dissenting opinions, that discussed harmless error. The majority standard for harmless error appears to be "whether there is 'a reasonable possibility that the error contributed to the outcome'" and that a "'reasonable possibility' is one 'sufficient to undermine confidence in the outcome.'" *Evelyn C.R. v. Tykila S. (In re Termination of Parental Rts. to Jayton S.)*, 2001 WI 110, ¶ 43, 246 Wis. 2d 1, 629 N.W.2d 768 (Crooks, J., concurring).

Courts often interchange "reasonable possibility" with "reasonable probability." The difference might be more than mere semantics. "There can be no doubt that there is a significant difference between what is reasonably probable and what is reasonably possible. 'A possibility test is the next thing to automatic reversal.'" *Id.* ¶ 45 (citation omitted).

The supreme court appeared to settle the harmless-error controversy one year after *Evelyn C.R.* was decided. *See State v. Harvey*, 2002 WI 93, ¶ 41, 254 Wis. 2d 442, 647 N.W.2d 189; *id.* ¶ 51 (Crooks, J., concurring) ("[T]his court has finally corrected the confusion by no longer relying on the term 'reasonable possibility.'"). However, more recent supreme court pronouncements again raise questions about the similarity among various formulations of the harmless-error test in criminal cases involving constitutional error. *See State v. Hale*, 2005 WI 7, ¶¶ 59–60, 277 Wis. 2d 593, 691 N.W.2d 637 (reiterating test that error is harmless if court determines "beyond a reasonable doubt" that the error did not contribute to the conviction); *id.* ¶¶ 86–89 (Wilcox, J., concurring); *see also State v. Barnes*, 2023 WI 45, ¶ 29, 407 Wis. 2d 652, 990 N.W.2d 759 (stating, in unanimous decision, that error is harmless if "guilty verdict actually rendered in this trial was surely unattributable to the error") (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)); *State v. Travis*, 2013 WI 38, ¶ 86, 347 Wis. 2d 142, 832 N.W.2d 491 (discussing the harmless-error test in the context of a sentencing error); *State v. Anderson*, 2006 WI 77, ¶ 130, 291 Wis. 2d 673, 717 N.W.2d 74 (noting wording of test is "a matter of dispute") (Roggensack, J., dissenting).

2. The *Dyess* formulation has been applied in civil as well as criminal cases. *See, e.g.*, *Town of Geneva v. Tills*, 129 Wis. 2d 167, 184–85, 384 N.W.2d 701 (1986). Harmless-error doctrine also applies in the context of administrative agency determinations. *See*

Responsible Use of Rural & Agric. Land (RURAL) v. Public Serv. Comm'n of Wis., 2000 WI 129, ¶ 63, 239 Wis. 2d 660, 619 N.W.2d 888.

3. Yet another way to define harmless error comes from the Seventh Circuit Court of Appeals, which has said that the test for harmless error is whether, in mind of average juror, prosecution's case would have been significantly less persuasive had improper evidence been excluded. *United States v. Eskridge*, 164 F.3d 1042, 1044 (7th Cir. 1998); *cf. State v. DelReal*, 225 Wis. 2d 565, 576, 593 N.W.2d 461 (Ct. App. 1999) (concluding that failure to admit exculpatory evidence was not harmless when state's case "was by no means airtight").

C. Constitutional Errors

Most errors of constitutional dimension are subject to the harmless-error rule. *State v. Nelson*, 2014 WI 70, ¶ 29, 355 Wis. 2d 722, 849 N.W.2d 317. In a very limited number of cases, a constitutional error may be structural and therefore "defy analysis by harmless-error standards." *Id.* ¶ 30 (internal quotation marks omitted) (concluding that denial of defendant's right to testify is not structural error and is subject to harmless-error review). Whether a particular error is structural—and therefore not subject to harmless error—is a question of law. *See State v. C.L.K. (In re Termination of Parental Rts. to S.M.H.)*, 2019 WI 14, ¶ 12, 385 Wis. 2d 418, 922 N.W.2d 807.

D. Sua Sponte Consideration of Harmless Error

If the appellate court concludes that an error occurred, it must consider whether the error was harmless, even if harmlessness is not argued or harmfulness is conceded. *See State v. Neave*, 220 Wis. 2d 786, 788, 585 N.W.2d 169 (Ct. App. 1998).

E. Issue Avoidance

An appellate court may decline to decide matters "neither fully at issue nor fully briefed" and affirm the circuit court's decision, even if that court erred, as long as the error was harmless. *See State v. Speese*, 199 Wis. 2d 597, 614, 545 N.W.2d 510 (1996).

F. Burden-Shifting in Ineffective Assistance of Counsel Challenges

The burden to prove harmless error typically rests with the party that benefited from the error. *State v. Roberson*, 2006 WI 80, ¶ 35, 292 Wis. 2d 280, 717 N.W.2d 111 (citation omitted). However, when a criminal defendant predicates a claim of ineffective assistance of counsel on an error, the burden shifts to the defendant to prove prejudice. *Id.* (observing the state ordinarily has a "heavy burden of establishing by clear and convincing evidence" that illegal activity did not taint an in-court identification).

XII. Self-Represented Litigants

A. Prisoners—Lenient Review

The appellate court follows a liberal policy when judging the sufficiency of pleadings by self-represented prisoners. *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶ 17, 242 Wis. 2d 94, 624 N.W.2d 150. The court treats a matter as if the prisoner had used the right procedural tool. *See e.g.*, *bin-Rilla v. Israel*, 113 Wis. 2d 514, 522–23, 335 N.W.2d 384 (1983) (petition for habeas corpus filed by self-represented prisoner treated as petition for mandamus).

B. Other Self-Represented Litigants—No Leniency

Other self-represented litigants are not entitled to leniency: "They are bound by the same rules that apply to attorneys on appeal." *Waushara Cnty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992); *see also Holz v. Busy Bees Contracting, Inc.*, 223 Wis. 2d 598, 609, 589 N.W.2d 633 (Ct. App. 1998) (at a minimum, self-represented appellant must show basis for undoing circuit court's findings).

XIII. Published State Precedent

A. State Supreme Court Decisions

"The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997); *see also Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2010 WI 44, ¶ 33, 324 Wis. 2d 703, 783 N.W.2d 294 (stating that whether the supreme court should alter Wisconsin jurisprudence presents a question of law).

But precedent is not binding if based on interpretation of federal law no longer in accord with subsequent decisions by the U.S. Supreme Court. *Kirsch v. Endicott*, 201 Wis. 2d 705, 715, 549 N.W.2d 761 (Ct. App. 1996).

B. Court of Appeals Decisions

"[T]he court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). But the court may explain why it believes the prior decision by the court of appeals or supreme court was wrongly decided. *Id.*

A court of appeals decision loses all precedential value when it is overruled by the supreme court unless the supreme court explicitly states that it is leaving portions of the court of appeals decision intact. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶¶ 44–56, 326 Wis. 2d 729, 786 N.W.2d 78.

"Only when a case is overruled does it lose all of its precedential value." *State v. Harris*, 2010 WI 79, ¶ 34 n.12, 326 Wis. 2d 685, 786 N.W.2d 409; *see also State v. Jackson*, 2011 WI App 63, ¶ 15 n.3, 333 Wis. 2d 665, 799 N.W.2d 461 (distinguishing between reversed and overruled court of appeals cases). In addition, "[t]he 'overruled unless' test cannot be applied retroactively with the same rigor that it can be applied prospectively…. Thus, … courts may have to interpret cases from [the supreme] court *that were decided prior to Blum* to determine whether an opinion 'overruling' a court of appeals decision really intended to overrule the entire decision or only a portion of it." *State v. Stevens*, 2012 WI 97, ¶ 92, 343 Wis. 2d 157, 822 N.W.2d 79.

C. "Dicta"—When Discussion Is Binding Decision

The court of appeals cannot dismiss a statement from a Wisconsin Supreme Court opinion by concluding that it is dictum. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 52–58, 324 Wis. 2d 325, 782 N.W.2d 682.

D. Mandate a Question of Law

The appellate "court is the final arbiter of the meaning of its own mandates, which [it] review[s] as questions of law." *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 22, 303 Wis. 2d 94, 735 N.W.2d 418.

Appendix D
Materials for Expedited Appeals

THE EXPEDITED APPEALS RULES FOR BRIEFING [1]

When a case is selected for the expedited appeals program under Wis. Stat. Rule 809.17, the appellate rules and procedures outlined in Wis. Stat. ch. 809, including those related to mandatory eFiling that took effect on July 1, 2021, apply to all expedited appeals **except as noted below**:

Rule 809.19(1)–(7)—[Timing and length of briefs]—The deadlines for filing and the length of briefs shall be established by court order.

Rule 809.19(1)(a)—[Table of contents and table of cases]—These are not required for the appellant's brief, the respondent's brief, or the reply brief.

Rule 809.19(1)(c)—[Statement re oral argument and publication]—These are not required for the appellant's brief or the respondent's brief.

Rule 809.19(4)(a)—[Reply brief]—The appellant is not required to file a reply brief or a statement that no reply brief will be filed.

Rule 809.19(8g)—[Certifications]—Required as modified; the litigant must certify that the brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) as modified by the court's order.

Note. The mandatory court form below is available online at https://www.wicourts.gov/courts/appeals/filing.htm.

STATE OF WISCONSIN, CIRCUIT COURT, _____, COUNTY

Case Caption (Case Name)

DOCKETING STATEMENT

Circuit Court Case No. _____

Case Number Issued by Court of Appeals

Appellant(s) (Cross-Applicant)	Attorney's Name and Address Attorney's Telephone Number
Respondent(s) (Cross-Respondent)	Attorney's Name and Address Attorney's Telephone Number

CRITERIA FOR EXPEDITED APPEALS

- This Docketing Statement is used solely to determine whether an appeal should be placed on the expedited appeal calendar. The respondent is not required to respond to the Docketing Statement. Generally, an appeal is appropriate for the expedited appeal calendar if:
  1. no more than 3 issues are raised;
  2. the parties' briefs will not exceed 15 pages in length; and
  3. the briefs can be filed in a shorter time than normally allowed.

  These requirements can be modified somewhat in appropriate cases.
- Parties should assume that the appeal will proceed under regular appellate procedure unless the court notifies them that the appeal is being considered for placement on the expedited appeals calendar.

JURISDICTION

Has judgment or order appealed from been "entered" (filed with the clerk of circuit court)?
☐ Yes ☐ No If yes, date of entry _____.
Is appeal timely? *(See §808.04, Wisconsin Statutes)*
☐ Yes ☐ No
Is judgment or order final (does it dispose of the entire matter in litigation as to one or more of the parties)?
☐ Yes ☐ No *(If "no", explain jurisdiction basis for appeal on separate sheet.)*

NATURE OF ACTION – Briefly describe the nature of action and the result in circuit court:

ISSUES – Specify the issues to be raised on appeal: *(Attach separate sheet if necessary.)*
(Failure to include any matter in the docketing statement does not constitute waiver of that issue on appeal. The court may impose sanctions if it appears available information was withheld. Court of Appeals Internal Operating Procedures, sec. VII(2)(b).)

AP-027, 07/21 Docketing Statement Wis. Stats. §§809.10(1)(d),(1)(h), 809.17(1) and 809.40(3)
This form shall not be modified. It may be supplemented with additional material.
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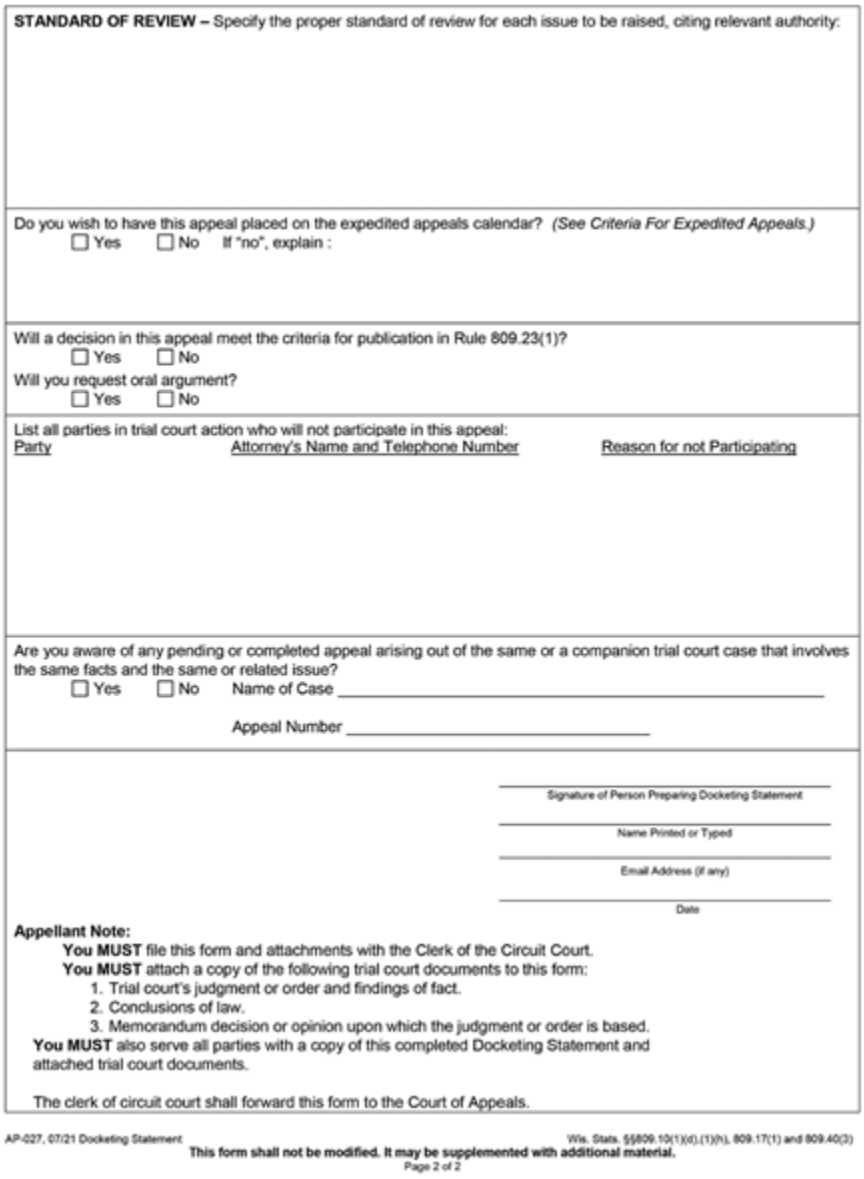

STANDARD OF REVIEW – Specify the proper standard of review for each issue to be raised, citing relevant authority:

Do you wish to have this appeal placed on the expedited appeals calendar? *(See Criteria For Expedited Appeals.)*
☐ Yes ☐ No If "no", explain :

Will a decision in this appeal meet the criteria for publication in Rule 809.23(1)?
☐ Yes ☐ No
Will you request oral argument?
☐ Yes ☐ No

List all parties in trial court action who will not participate in this appeal:
Party | Attorney's Name and Telephone Number | Reason for not Participating

Are you aware of any pending or completed appeal arising out of the same or a companion trial court case that involves the same facts and the same or related issue?
☐ Yes ☐ No Name of Case _____
Appeal Number _____

_____
Signature of Person Preparing Docketing Statement
_____
Name Printed or Typed
_____
Email Address (if any)
_____
Date

Appellant Note:
You MUST file this form and attachments with the Clerk of the Circuit Court.
You MUST attach a copy of the following trial court documents to this form:
1. Trial court's judgment or order and findings of fact.
2. Conclusions of law.
3. Memorandum decision or opinion upon which the judgment or order is based.

You MUST also serve all parties with a copy of this completed Docketing Statement and attached trial court documents.

The clerk of circuit court shall forward this form to the Court of Appeals.

AP-027, 07/21 Docketing Statement Wis. Stats. §§809.10(1)(d),(1)(h), 809.17(1) and 809.40(3)
This form shall not be modified. It may be supplemented with additional material.
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Appendix E

Forms for Use in Appeals

Note to Book Forms Users and Books UnBound Subscribers. Information on How to Use the Book Forms and the Index to Book Forms is at the front of the print book, on the pages immediately following the "How to Use" tab, which appears directly after the book's Table of Contents. Subscribers to this title in Books UnBound can download these forms in Microsoft Word by navigating to the State Bar of Wisconsin's website, https://www.wisbar.org/ProfilePage/Pages/myMedia_BooksUnBound.aspx (click on "Forms—Appellate Practice and Procedure in Wisconsin" hyperlink). [1]

Note. Effective July 1, 2023, the Wisconsin Supreme Court terminated the interim rule governing filings in that court, made electronic filing (e-filing) mandatory for attorneys in all cases and proceedings in that court (except for a limited number of categories of "judicial/attorney proceedings"), and made the Wisconsin Rules of Appellate Procedure (including the rules governing e-filing), Wis. Stat. ch. 809, applicable to all supreme court cases and proceedings other than judicial and attorney proceedings. Wis. Sup. Ct. Order 19-02C and 20-07C, 2023 WI 10, ___ Wis. 2d ___ (issued Feb. 21, 2023; adopting second amended revised interim rule eff. Apr. 1, 2023 through June 30, 2023).

Note. The printed forms in appendix E are provided only as samples for content purposes and not as exact representations of document size, font size, line spacing, margins, pagination, etc. Attorneys are reminded to look to the appellate rules for formatting requirements and to resources on the Wisconsin Court System's website, including the e-filing information at https://www.wicourts.gov/ecourts/efileappellate/tech.htm (updated Oct. 5, 2023).

Court of Appeals Proceedings

1. Notice of Intent to Pursue Postconviction or Postdisposition Relief (APP-0002)
2. Petition for Leave to Appeal Nonfinal Judgment or Order (and Request for Temporary Relief) (APP-0003)
3. Notice of Appeal, Cross-appeal, Additional Appeal, Amended Appeal, or No-Merit Appeal (APP-0004)
4. Petition for Supervisory Writ (Court of Appeals) (APP-0005)
5. Statement on Transcript (APP-0006)
6. Statement on Transcript—Designation of Additional Portions (APP-0007)
7. Statement on Transcript—Request for Additional Portions (APP-0008)
8. Petition to Intervene (APP-0009)
9. Notice of Voluntary Dismissal (APP-0010)
10. Motion (Basic Form) (APP-0011)
11. Motion for Relief Pending Appeal (APP-0012)
12. Motion to Consolidate Appeals (APP-0013)
13. Stipulation to Consolidate Appeals (APP-0014)
14. Motion to Advance (APP-0015)
15. Motion to Supplement or Correct Record on Appeal (APP-0016)
16. Motion to File Amicus Curiae Brief (APP-0017)
17. Motion to Enlarge Time for Filing Brief (APP-0018)
18. Sample Brief Cover (APP-0019)
19. Certification of Form and Length of Appellate Briefs (APP-0020)
20. Certification by Attorney of Brief Appendix (APP-0022)
21. Certification of Mailing or Delivery (APP-0024)
22. Statement of Costs (APP-0025)
23. Motion for Reconsideration (Court of Appeals) (APP-0026)

Supreme Court Proceedings

24. Petition to Bypass Court of Appeals (APP-0027)
25. Petition for Review (APP-0028)
26. Petition for Leave to Commence Original Action (APP-0029)
27. Petition for Supervisory Writ (Supreme Court) (APP-0030)
28. Motion for Reconsideration (Supreme Court) (APP-0031)

Note: The Wisconsin Court of Appeals has also developed several sample forms intended for use by self-represented litigants in the appeals process. Although not reproduced in this appendix, those nonmandatory forms are available on the Wisconsin Court System's website at https://www.wicourts.gov/forms1/appeals.jsp?Category=59 (updated Feb. 13, 2022).

Form 1. Notice of Intent to Pursue Postconviction or Postdisposition Relief (APP-0002) [Wis. Stat. §§ 809.107(2)(bm), 809.30(2)]

STATE OF WISCONSIN : CIRCUIT COURT : _____ COUNTY
BRANCH _____

(Plaintiff's name),

(Plaintiff) (Petitioner)

v.

(Defendant's name), Case No. _____

(Defendant) (Respondent)

NOTICE OF INTENT TO PURSUE
(POSTCONVICTION) (POSTDISPOSITION) RELIEF[1]

TO: (Circuit court clerk of court)
(Prosecutor and any other parties)

PLEASE TAKE NOTICE that (name), (address), intends to pursue (postconviction) (postdisposition) relief from the (final judgment) (order) in case no. ___, (granted) (entered) on (date) in the circuit court for ___ County, Judge (judge's name) presiding, in which the court (describe judgment or order).

* [State the name and address of the person's trial counsel, whether counsel was appointed or privately retained, and, if appointed, whether the person's financial circumstances have measurably improved since indigency was determined.]

* [State whether the person requests the state public defender to appoint counsel for postconviction or postdisposition proceedings, or, if not, whether the person will represent himself or herself or will retain counsel.]

* [If postconviction or postdisposition counsel has been retained, state counsel's name and address.]

[1] "Within 20 days after the date of sentencing or final adjudication, the person shall file in circuit court and serve on the prosecutor and any other party a notice of intent to pursue postconviction or postdisposition relief." Wis. Stat. § 809.30(2)(b). The notice is required for criminal cases and cases under Wis. Stat. § 971.17 or Wis. Stat. ch. 48, 51, 55, 938, or 980; in noncriminal cases in which the notice is required, the notice should be styled as seeking "postdisposition" relief. *See* Wis. Stat. § 809.30(1)(a), (d), (2)(b). For an appellant other than the state, a notice of intent to pursue postdisposition relief in a termination-of-parental-rights case must include the signatures of both the parent pursuing relief and counsel for the parent, if any. *See* Wis. Stat. § 809.107(2)(bm)6.

In lieu of this sample form, litigants can use court of appeals form CA-100 (for termination-of-parental-rights cases) or form CA-110 (for all other appeals), available at https://www.wicourts.gov/forms1/appeals.jsp?Category=59.

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

Form 2. Petition for Leave to Appeal Nonfinal Judgment or Order (and Request for Temporary Relief)

(APP-0003) [Wis. Stat. §§ 809.50, 809.52]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Plaintiff's name) ____,

Plaintiff–(Petitioner) (Respondent)

v.

(Defendant's name) __, Circuit Court Case No. _____

Defendant–(Petitioner) (Respondent)

PETITION FOR LEAVE TO APPEAL NONFINAL JUDGMENT OR ORDER (AND REQUEST FOR TEMPORARY RELIEF)[1]

(Petitioner's name) petitions the Court of Appeals, District _____, for leave to appeal from a nonfinal (judgment) (order) in case no. ___, entered on _____, _____, in the circuit court for _____ County, Judge (trial judge's name) presiding, in which the court (describe judgment or order).

The reasons supporting immediate review are as follows:

* [State the issues presented by the controversy and the facts necessary for an understanding of the issues.]

* [State why review of judgment or order immediately rather than on appeal from final judgment will (a) materially advance termination of litigation or clarify further proceedings in litigation, (b) protect the party from substantial and irreparable injury, or (c) clarify an issue of general importance in the administration of justice.[2]]

[1] A $195 filing fee must be paid to the clerk of the court of appeals. Wis. Stat. § 809.25(2)(a)1. The petition must be filed electronically (i.e., e-filed in the appellate court e-filing system) by attorneys and voluntary e-filers (also referred to as *electronic parties* or *e-filing parties*) using the procedures outlined in Wis. Stat. § 809.801(5)(d), but self-represented litigants who are not e-filers (i.e., *paper parties*) may file a single paper copy of the petition in the court of appeals using the procedures outlined in Wis. Stat. § 809.80. E-filers are served through the circuit court e-filing system when the clerk of the court of appeals transmits the petition to the clerk of the circuit court, but all paper parties must be served by traditional methods. Wis. Stat. §§ 809.50(1m), 809.80(2)(e), 809.801(6)(c). Captions, except as provided in Wis. Stat. § 809.81(8), must include the full name of each party in the circuit court and must designate each party so as to identify each party's status in the circuit court and in the appellate court. Wis. Stat. § 809.81(9).

If the court of appeals grants the petition, the petitioner must file a docketing statement in the court of appeals within 11 days. Wis. Stat. § 809.50(3). (A docketing statement is not required for self-represented litigants or for appeals brought under Wis. Stat. § 809.105, 809.107, 809.30 (except for appeals in Wis. Stat. ch. 48, 51, 55, or 938 cases), 809.32, 974.05, or 974.06(7), or under Wis. Stat. ch. 980. Wis. Stat. § 809.10(1)(d).) The docketing statement, court of appeals form AP-027, can be obtained from the Wisconsin Court System's website at https://www.wicourts.gov/forms1/appeals.jsp?Category=59. Wis. Stat. §§ 809.10(1)(d), 809.50(3).

[2] A copy of the judgment or order sought to be reviewed must be attached. *See* Wis. Stat. § 809.50(1)(d). Additionally, attach as exhibits any accompanying decision (e.g., transcript of a motion hearing) and other relevant

[Add if appropriate] Pursuant to Wis. Stat. § 809.52, petitioner further requests that the court (specify desired temporary relief, e.g., granting of stay) pending disposition of this petition.

[State specific facts showing why temporary relief is necessary.][3]

This would (not) be an appeal within Wis. Stat. § 752.31(2).

This would (not) be an appeal entitled to preference by statute **[add if appropriate]** pursuant to Wis. Stat. § _____.

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

documents. If the transcript is not yet available, the petitioner can either move for an extension of time to file the petition or timely file the petition and indicate in the petition the intent to file a motion to supplement the petition with the transcript as soon as it is available. Providing exhibits is especially important because the court of appeals does not have access to the circuit court record, including pleadings and transcripts. Although Wis. Stat. § 809.50(1) does not require a supporting memorandum, good practice requires that one be filed, either as a separate document or included in the petition, and that it address in detail the statutory criteria and the merits of the appeal, citing relevant authorities. *See* Wis. Stat. § 809.50 (length of petition and memorandum and procedure for response).

[3] A petitioner can seek temporary relief pursuant to Wis. Stat. § 809.52. Although Wis. Stat. § 809.52 does not require, as does Wis. Stat. § 809.12, that a party first request relief in the circuit court, doing so is usually advisable, and the petition should inform the court of those efforts.

CERTIFICATION[4]

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.50(1). The length of this petition and memorandum is _____ [pages] [words].

Dated: _____, _____

(Firm name)

Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[4] A certification is required by Wis. Stat. § 809.50(4). The petition and memorandum combined cannot exceed 35 pages if a monospaced font or handwriting is used or 8,000 words if a proportional serif font is used. Wis. Stat. § 809.50(1).

Form 3. Notice of Appeal, Cross-appeal, Additional Appeal, Amended Appeal, or No-Merit Appeal (APP-0004) [Wis. Stat. § 809.10]

STATE OF WISCONSIN : CIRCUIT COURT : _____ COUNTY
BRANCH _____

Case name from circuit court (Caption)

Case No. _____

NOTICE OF (CROSS-) (ADDITIONAL) (AMENDED) (NO-MERIT) APPEAL[1]

TO: (Circuit court clerk of court)
(All counsel of record and unrepresented parties)

PLEASE TAKE NOTICE that (name of appellant or cross-appellant) appeals to the Court of Appeals, District _____, from (the entire) (a portion of the) final (judgment) (order) in case no. _____ entered on _____, _____, in _____ County, Hon. (name) presiding, in which the court (describe judgment or order).

[Add if appropriate, i.e., if this is an appeal under Wis. Stat. § 809.30 or Wis. Stat. § 809.32.[2]]

* [If a postconviction motion is not filed, state the date of service of the last transcript or service of a copy of the circuit court case record.]

[1] A $195 filing fee must be paid to the clerk of the court of appeals using the electronic payment system or by making arrangements with the clerk of court. Wis. Stat. §§ 809.25(2)(a)1., 809.801(7)(a). If the litigant is indigent, the attorney should file a petition for waiver of fees or attach to the notice of appeal a copy of the appointment letter from the State Public Defender. The notice of appeal, docketing statement, and statement on transcript must be e-filed in the circuit court. Wis. Stat. §§ 809.10(1), 809.11(4)(b), 809.801(5)(c). Electronic parties are served through the circuit court e-filing system, but paper parties must be served using traditional methods. Wis. Stat. § 809.801(6). The docketing statement (form AP-027) can be obtained from the Wisconsin Court System's website at https://www.wicourts.gov/forms1/appeals.jsp?Category=59. Wis. Stat. § 809.10. (Pursuant to Wis. Stat. § 809.10(1)(d), a docketing statement is not required for appeals filed by self-represented litigants or appeals brought under Wis. Stat. § 809.105, 809.107, or 809.30 (except for appeals in Wis. Stat. ch. 48, 51, 55, or 938 cases), 809.32, 974.05, or 974.06(7), or under Wis. Stat. ch. 980.)

For an appellant other than the state, a notice of appeal in a termination-of-parental-rights case must include the signatures of both the parent pursuing relief and counsel for the parent, if any. *See* Wis. Stat. § 809.107(5)(a). Captions, except as provided in Wis. Stat. § 809.81(8), must include the full name of each party in the circuit court and must designate each party so as to identify each party's status in the circuit court and in the appellate court. Wis. Stat. § 809.81(9).

In lieu of this sample form, litigants can use court of appeals form CA-120 or form CA-120T (for termination-of-parental-rights cases), available at https://www.wicourts.gov/forms1/appeals.jsp?Category=59.

[2] *See* Wis. Stat. § 809.10(1)(b)5.

* [If a postconviction motion is filed, state the date of the order deciding the postconviction motion(s).]

* [If the court of appeals established any other filing deadline, state it.]

[Add if appropriate, i.e., if this is an appeal in an action in which the sole defendant in the circuit court was the state or an agent of the state.[3]] This is an appeal in which the sole defendant in the circuit court was the state or an agent of the state under Wis. Stat. § 752.21. Accordingly, the appellant selects District __ as the district of the court of appeals that will hear this appeal. District __ is not the district that contains the court of _____ County, which entered the (judgment) (order) from which the appellant is filing this notice of appeal.

This is (not) an appeal within Wis. Stat. § 752.31(2).

This is (not) an appeal entitled to preference by statute **[add if appropriate]** pursuant to Wis. Stat. § _____.

[Add if appropriate.[4]] A copy of the order appointing counsel under Wis. Stat. ch. 977 is attached.

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[3] *See* Wis. Stat. § 752.21.
[4] If counsel is appointed under Wis. Stat. ch. 977, a copy of the order appointing counsel must be attached to the notice of appeal. Wis. Stat. § 809.10(1)(b)6.

Form 4. Petition for Supervisory Writ (Court of Appeals) (APP-0005) [Wis. Stat. §§ 809.51, 809.52]

WISCONSIN COURT OF APPEALS
DISTRICT _____

State ex rel. (Petitioner's name),

Petitioner

v.

Circuit Court for (_____ County,

the Hon. _____ Presiding,)

and (all other parties),

Respondents

Circuit Court Case No. _____
(if applicable)

PETITION FOR SUPERVISORY WRIT[1]

(Petitioner's name) petitions the Court of Appeals, District ___, for a writ of (type of writ), (state relief sought) on the following grounds:

[State (a) the issues presented by the controversy, (b) the facts necessary for an understanding of the issues, and (c) the reasons why the court should take jurisdiction. Attach all relevant documents as exhibits, including any relevant circuit court order or decision.]

[Add if appropriate] Pursuant to Wis. Stat. § 809.52, petitioner further requests that the court (specify desired temporary relief, e.g., granting of stay) pending the disposition of this petition.

[1] A $195 filing fee is required. Wis. Stat. § 809.25(2)(a)1. The petition is filed using the court of appeals e-filing system, but unlike many other appellate filings, the petition must be served on other parties using traditional methods. *See* Wis. Stat. §§ 809.51, 809.801(5). Subsequent filings are served through the e-filing system, except paper parties must be served using traditional methods. *See* Wis. Stat. § 809.801(6)(c).

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

CERTIFICATION[2]

I certify that this petition for supervisory writ conforms to the rules contained in Wis. Stat. § 809.51(1). The length of this petition and memorandum is _____ [pages] [words].

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[2] *See* Wis. Stat. § 809.51(4). The petition and memorandum combined cannot exceed 35 pages if a monospaced font or handwriting is used or 8,000 words if a proportional serif font is used. Wis. Stat. § 809.50(1).

Form 5. Statement on Transcript (APP-0006) [Wis. Stat. § 809.11(4)]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use circuit court caption unless the court of appeals has assigned one) Appeal No. _____

STATEMENT ON TRANSCRIPT[1]

TO: Clerk of Circuit Court (All counsel of record and unrepresented parties)

Check one:

_____All necessary transcripts have been filed.[2]

_____A transcript is not necessary for prosecution of the appeal.

_____I have made arrangements for the filing and service of the following transcript(s), as certified below by the court reporter:

[Specify, for example, pretrial proceedings, posttrial proceedings, motion hearings.]

[1] This statement must be filed by the appellant or cross-appellant with the clerk of the circuit court within 14 days after filing the notice of appeal in the circuit court. Wis. Stat. § 809.11(4). Shorter deadlines apply in certain cases, such as termination-of-parental-rights cases. *See* Wis. Stat. §§ 809.107(5)(d), 809.104(2)(d).

[2] This first option should generally apply to appeals under Wis. Stat. § 809.107 or Wis. Stat. § 809.30. In appeals under Wis. Stat. §§ 809.107 and 809.30, counsel appointed by the state public defender should also check that arrangements have been made for service of transcripts on the respondents.

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

(Complete the section below only if a transcript has been requested)

COURT REPORTER:[3]

I certify that on _____, _____, the transcript or designated portions of the transcript in (caption), appeal no. ____, were requested and that arrangements have been made to pay the transcript costs. The transcript will be filed with the clerk of the circuit court, pursuant to Wis. Stat. § 809.11(7) on or before _____, .

Dated: _____, _____

Signed by: _____
(Court reporter's name)
Court Reporter
_____ County Circuit Court
(Address)
(Telephone no.)

[3] In most cases, the court reporter has 60 days to complete the transcript. Wis. Stat. § 809.11(7). *But see, e.g.*, Wis. Stat. §§ 809.107(4m) (termination of parental rights), 809.30(2)(g) (postconviction or postdisposition relief), 809.105(5) (abortion).

Wis. Stat. § 809.11(7)(b) requires the court reporter to return this signed statement to the appellant within 5 days after receipt.

In lieu of this sample form, litigants can use court of appeals form CA-130, which is available at https://www.wicourts.gov/forms1/appeals.jsp?Category=59.

Form 6. Statement on Transcript—Designation of Additional Portions (APP-0007) [Wis. Stat. § 809.11(5)]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

**STATEMENT ON TRANSCRIPT—
DESIGNATION OF ADDITIONAL PORTIONS**[1]

TO: Clerk of Court of Appeals (All counsel of record and unrepresented parties)

Pursuant to Wis. Stat. § 809.11(5), (name), (status, e.g., respondent), designates the following portions to be included in the transcript in addition to those portions designated in appellant's Statement on Transcript, dated _____, _____, and served on _____, _____:

[Specify, for example, pretrial proceedings, trial, posttrial proceedings, motion hearings.]

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] This statement must be filed in the court of appeals within 14 days after the appellant's filing of a statement on transcript, and a copy must be served on the appellant. Wis. Stat. § 809.11(5).

Form 7. Statement on Transcript—Request for Additional Portions (APP-0008) [Wis. Stat. § 809.11(5)]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

**STATEMENT ON TRANSCRIPT—
REQUEST FOR ADDITIONAL PORTIONS**[1]

TO: Clerk of Circuit Court (All counsel of record and unrepresented parties)

Satisfactory arrangements have been made with the court reporter for the following additional portions of the transcript as certified below by the court reporter:

[Specify arrangements; must include designations in Statement on Transcript—Designation of Additional Portions.]

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] If the Statement on Transcript—Designation of Additional Portions (*see supra* Form 6) is filed, this statement must be filed by the appellant or cross-appellant with the clerk of the circuit court within 14 days after the filing of the other party's designation. Wis. Stat. § 809.11(5).

COURT REPORTER:[2]

I certify that on _____, _____, the transcript or designated portions of the transcript in (caption), appeal no. _____, were requested and that arrangements have been made to pay the transcript costs. The transcript will be filed with the clerk of the circuit court, pursuant to Wis. Stat. § 809.11(7) on or before _____, _____.

Dated: _____, _____

Signed by: _____
(Court reporter's name)
Court Reporter
_____ County Circuit Court
(Address)
(Telephone no.)

[2] In most cases, the court reporter has 60 days to complete the transcript. Wis. Stat. § 809.11(7). *But see, e.g.*, Wis. Stat. §§ 809.107(4m) (termination of parental rights), 809.30(2)(g) (postconviction or postdisposition relief), 809.105(5) (abortion). A reporter may file a motion with the court of appeals seeking an extension to file and serve the transcript. Wis. Stat. §§ 809.11(7)(c), 809.30(2)(g)2.

Wis. Stat. § 809.11(7)(b) requires the court reporter to return this signed statement to the appellant within 5 days after receipt.

Form 8. Petition to Intervene (APP-0009) [Wis. Stat. §§ 809.13, 803.09]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

PETITION TO INTERVENE[1]

(Petitioner's name) petitions the Court of Appeals, District ___, pursuant to Wis. Stat. § 809.13, for an order permitting petitioner to intervene in this appeal as (designate intervening position) on grounds that petitioner (state petitioner's interest as described in Wis. Stat. § 803.09(1), (2), or (2m)).

In support of this petition, petitioner states:

[Specify with particularity the facts necessary to demonstrate that petitioner's interest meets the requirements of Wis. Stat. § 803.09(1), (2), or (2m); explain why intervention did not occur before appeal.]

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] The petition must be filed with the clerk of the court of appeals, and any party may file a response to the petition within 11 days after service of the petition. Wis. Stat. § 809.13.

Form 9. Notice of Voluntary Dismissal (APP-0010) [Wis. Stat. § 809.18]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals) Appeal No. _____

NOTICE OF VOLUNTARY DISMISSAL[1]

PLEASE TAKE NOTICE that (appellant's name), appellant, voluntarily dismisses the appeal in this action pursuant to Wis. Stat. § 809.18.

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] Counsel must file this notice electronically with the clerk of the court of appeals, which will provide service to e-filing parties. Paper parties must be served with a paper copy of the notice. Wis. Stat. § 809.801(6).

Form 10. Motion (Basic Form) (APP-0011) [Wis. Stat. §§ 809.14, 809.80, 809.81]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

MOTION (TO) (FOR) _____[1]

(Movant's name), (status, e.g., appellant), moves the Court of Appeals, District __, for (state order or relief sought). The grounds for this motion are

[State with particularity the grounds for granting the motion, including the issues and all facts necessary to decide the motion. A motion may be supported by a memorandum. Attach all material exhibits; do not assume the court will refer to the record to remedy factual insufficiencies in the motion. The court will deny motions that do not contain sufficient facts or a sufficient statement of reasons for the motion. Including a statement of the other party's position is optional.]

[1] Counsel must file this motion electronically with the clerk of the court of appeals. *See* Wis. Stat. § 809.14; *see also* Wis. Stat. §§ 809.80 (filing by traditional methods), 809.801 (e-filing). "[A]ny other party may file a response to the motion within 11 days after service." Wis. Stat. § 809.14(1). *But see* Wis. Stat. § 809.14(1m) (termination of parental rights). A motion for a procedural order may be acted on without a response. Wis. Stat. § 809.14(2).

In lieu of this sample form, litigants can use court of appeals form CA-170, which is available at https://www.wicourts.gov/forms1/appeals.jsp?Category=59.

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

Form 11. Motion for Relief Pending Appeal (APP-0012) [Wis. Stat. §§ 809.12, 808.07]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

MOTION FOR RELIEF PENDING APPEAL[1]

(Movant's name), (status, e.g., appellant), moves the Court of Appeals, District ___, pursuant to Wis. Stat. §§ 808.07 and 809.12, for the following relief pending appeal:[2]

[State with particularity the relief sought and cite appropriate subsection of Wis. Stat. § 808.07]

The grounds for this motion are:

[If the motion has been filed in the circuit court, state the reasons given by the circuit court for its action and attach the order denying the motion and, if available, the oral or written decision; if the motion has not been filed in the circuit court, state the reasons why it was impractical to seek relief in the circuit court. A memorandum should accompany the motion, showing the merits of the appeal, the harm caused by a failure to grant a stay, and the lack of harm to the other party if a stay is granted, and addressing any public concerns if a stay is granted.]

[1] Counsel must file this motion electronically with the clerk of the court of appeals. Wis. Stat. § 809.14; *see also* Wis. Stat. §§ 809.80 (filing by traditional methods), 809.801 (e-filing). If a notice of appeal has not yet been filed, the clerk of court will assign a pre-appeal case number, designated by the letters XX. *See* Wis. Stat. § 809.14(5); *see also* Wis. Sup. Ct. Pet. 20-07 app. A (containing Appellate eFiling Committee explanatory notes).

In lieu of this sample form, litigants can also use court of appeals form CA-160, available at https://www.wicourts.gov/forms1/appeals.jsp?Category=59.

[2] A person seeking relief pending appeal shall first seek relief from the circuit court by filing a motion in the circuit court unless it is impractical to do so. Wis. Stat. § 809.12.

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

Form 12. Motion to Consolidate Appeals (APP-0013) [Wis. Stat. § 809.10(3)]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

MOTION TO CONSOLIDATE APPEALS[1]

(Movant's name), (status, e.g., appellant), in appeal no. (movant's appeal no.), moves the Court of Appeals, District ___, pursuant to Wis. Stat. § 809.10(3), to consolidate appeal no. (movant's appeal no.) with appeal no(s). _____ on the following grounds:

[State with particularity the grounds for granting the motion, including the issues and all facts necessary to support consolidation, such as common factors in the cases and the reasons why consolidation would benefit the court and parties. Including a statement of the other party's position is optional.]

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] Counsel must file this motion electronically with the clerk of the court of appeals. Wis. Stat. § 809.14; *see also* Wis. Stat. §§ 809.80 (filing by traditional methods), 809.801 (e-filing). There is no need to submit a proposed order because the court of appeals issues its own orders.

Form 13. Stipulation to Consolidate Appeals (APP-0014) [Wis. Stat. § 809.10(3)]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned by court of appeals)

Appeal No. _____

(Use caption assigned by court of appeals)

Appeal No. _____

STIPULATION TO CONSOLIDATE APPEALS[1]

STIPULATION

The parties, by their attorneys, stipulate pursuant to Wis. Stat. § 809.10(3) that appeal nos. _____ and _____ be consolidated for consideration and disposition by the court.

Consolidation is appropriate for the following reasons:

[State with particularity the issues and facts necessary to support consolidation, including common factors in the two cases and the reasons why consolidation would benefit the court and parties.]

[1] Counsel must file this stipulation electronically with the clerk of the court of appeals. Wis. Stat. § 809.14; *see also* Wis. Stat. § 809.801. There is no need to submit a proposed order because the court of appeals issues its own orders.

Dated: _____,

(Firm name)
Attorneys for the (status, e.g., appellant)

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

Dated: _____,

(Firm name)
Attorneys for the (status, e.g., respondent)

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

Form 14. Motion to Advance (APP-0015) [Wis. Stat. § 809.20]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

MOTION TO ADVANCE[1]

(Movant's name), (status, e.g., appellant), in appeal no. _____, moves the Court of Appeals, District _____, pursuant to Wis. Stat. § 809.20, to advance the submission of this appeal on the following grounds:

[State with particularity the nature of the public or private interest involved, the issues in the case, and how a delay in submission will prejudice the accomplishment of justice.]

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] Counsel must file this motion electronically with the clerk of the court of appeals. Wis. Stat. § 809.14; *see also* Wis. Stat. §§ 809.80 (filing by traditional methods), 809.801 (e-filing). This motion can be filed either before or after the briefs have been filed, Wis. Stat. § 809.20, but it is more likely to be successful if filed earlier in the appellate process.

An alternative to this motion is a motion, made shortly after the filing of the notice of appeal, for a shortening of time periods (i.e., time for filing briefs) pursuant to Wis. Stat. § 809.82(2). Another alternative is to participate in the expedited appeals program established under Wis. Stat. § 809.17; for more information, including the list of eligible case types, see https://www.wicourts.gov/courts/appeals/docs/expedited.pdf.

Form 15. Motion to Supplement or Correct Record on Appeal (APP-0016) [Wis. Stat. § 809.15(4)(c)]

WISCONSIN COURT OF APPEALS[1]
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

MOTION TO (SUPPLEMENT) (CORRECT) RECORD ON APPEAL

(Movant's name), (status, e.g., appellant), moves the Court of Appeals, District ___, pursuant to Wis. Stat. § 809.15(4)(c), for the court to (correct) (supplement) the record as follows:

[Describe items to be included or errors to be corrected.]

The grounds for this motion are that (explain the reasons in this paragraph or in an accompanying affidavit).

[1] A motion to supplement or correct the record on appeal is made to the court in which the record is located. *See* Wis. Stat. § 809.15(3). If the record is not in the court of appeals, revise this form accordingly. If the motion is filed in the circuit court, the clerk of the circuit court will transmit to the clerk of the court of appeals a copy of any motion to supplement or correct the record that is filed in the circuit court. Wis. Stat. § 809.15(4)(c).

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

Form 16. Motion to File Amicus Curiae Brief (APP-0017) [Wis. Stat. § 809.19(7)]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

MOTION TO FILE AMICUS CURIAE BRIEF[1]

(Movant's name) moves the Court of Appeals, District ____, pursuant to Wis. Stat. § 809.19(7), for permission to file a brief in appeal no. _____. The grounds for this motion are

[Identify the movant's interest and state why a brief filed by the movant is desirable.]

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] A motion requesting permission to file a nonparty (amicus curiae) brief in the court of appeals must be filed no later than 14 days after the respondent's brief. *See* Wis. Stat. § 809.19(7)(c). Counsel must file this motion electronically with the clerk of the court of appeals. Wis. Stat. § 809.14; *see also* Wis. Stat. §§ 809.80 (filing by traditional methods), 808.801 (e-filing). Pursuant to Wis. Stat. § 809.19(7)(d), amicus curiae briefs must follow the briefing rules in Wis. Stat. § 809.19(1)(e) and (f).

Form 17. Motion to Enlarge Time for Filing Brief (APP-0018) [Wis. Stat. § 809.82]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

MOTION TO ENLARGE TIME FOR FILING BRIEF[1]

(Movant's name), (status, e.g., appellant), moves the Court of Appeals, District ___, pursuant to Wis. Stat. § 809.82, for an order enlarging by (number) days the time for filing movant's brief, making the brief due on _____, _____. The grounds for this motion are that

[State reasons that show good cause. It is also helpful to the court to indicate whether this is the first extension, second extension, etc.]

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] Counsel must file this motion electronically with the clerk of the court of appeals. Wis. Stat. § 809.14; *see also* Wis. Stat. §§ 809.80 (filing by traditional methods), 808.801 (e-filing).

Form 18. Sample Brief Cover (APP-0019) [Wis. Stat. § 809.19(9)]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)
Case No. _____

(Plaintiff-Appellant's) (Defendant-Appellant's) (Plaintiff-Respondent's) (Defendant-Respondent's) (Reply) Brief[1]

Appeal from the circuit court for _____ County, (judge's name), Judge.

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] Counsel must file briefs electronically with the clerk of the court of appeals. Wis. Stat. § 809.19(8); *see also* Wis. Stat. § 809.801. Paper briefs are not required, except paper parties must be served with one paper copy of the appellate brief, which must have a white cover. Wis. Stat. § 809.19(8). Captions, except as provided in Wis. Stat. § 809.81(8), must include the full name of each party in the circuit court and must designate each party so as to identify each party's status in the circuit court and in the appellate court (e.g., Defendant-Appellant, Plaintiff-Respondent). Wis. Stat. § 809.81(9).

In lieu of this sample form, litigants can use court of appeals form CA-150, which is available at https://www.wicourts.gov/forms1/appeals.jsp?Category=59.

Form 19. Certification of Form and Length of Appellate Briefs (APP-0020) [Wis. Stat. § 809.19(8g)(a)]

CERTIFICATION[1]

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is _____ [pages] [words].

Dated: _____

Electronically signed by _____
(Attorney's name)
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

[1] Counsel must include this at the end of every brief in the court of appeals. Wis. Stat. § 809.19(8g)(a).

Form 20. Certification by Attorney of Brief Appendix (APP-0022) [Wis. Stat. § 809.19(8g)(b)]

CERTIFICATION BY ATTORNEY[1]

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum:

(1) A table of contents;

(2) The findings or opinion of the circuit court;

(3) A copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and

(4) Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: _____

Electronically signed by _____
(Attorney's name)
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

[1] An appendix certification is also required if a respondent files a supplemental appendix. *See* Wis. Stat. § 809.19(3)(b). See Wis. Stat. § 809.19(6)(f) for the related rules for a respondent-cross-appellant. Counsel should include this certification at the end of the brief that is filed electronically in the court of appeals. Wis. Stat. § 809.19(8g)(b).

Form 21. Certification of Mailing or Delivery (APP-0024) [Wis. Stat. § 809.80(4)]

CERTIFICATION OF MAILING[1]

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by (describe the class of mail used, e.g., first-class mail or other class of mail that is at least as expeditious), on (date of mailing). I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated: _____

Signed: _____

OR

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on (date of delivery to carrier), this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within three calendar days. I further certify that the brief or appendix was correctly addressed.

Dated: _____

Signed: _____

[1] The certification of mailing or delivery should be included by a party who is filing the brief or appendix with the court by traditional methods rather than by electronic filing; this will not include attorneys, who are mandatory e-filers. As an alternative to filing a certification, the paper party may file an affidavit of mailing or delivery setting forth the same information. *See* Wis. Stat. § 809.80(4).

Form 22. Statement of Costs (APP-0025) [Wis. Stat. § 809.25]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Use caption assigned
by the court of appeals)

Appeal No. _____

STATEMENT OF COSTS[1]

TO: Clerk of Court of Appeals (All counsel of record and unrepresented parties)

Set forth below is the statement of the costs of (designate position in case) filed pursuant to Wis. Stat. § 809.25:

	Adjustments
1. Cost of printing and assembly, not to exceed $0.15 per page[2]	$ _____
2. Fees charged by the clerk of court	$ _____
3. Costs for transcripts or appeal bonds	$ _____
4. Fees of the trial court clerk for preparation of the record	$ _____
5. Other costs as directed by the court	
Total	$ _____

[1] Counsel for the party seeking to recover costs must electronically file the statement of costs within 14 days after the filing of the court's decision. Wis. Stat. § 809.25(1)(c). An opposing party can file a motion objecting to the statement of costs within 11 days after service of the statement. *Id.*

[2] The rate of $0.15 per page is the "rate[] generally charged in Dane County, Wisconsin" under Wis. Stat. § 809.25(1)(b)1.

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

Form 23. Motion for Reconsideration (Court of Appeals) (APP-0026) [Wis. Stat. § 809.24]

WISCONSIN COURT OF APPEALS
DISTRICT _____

(Case Name (Caption)
(Use caption assigned by the court of appeals) Appeal No. _____

MOTION FOR RECONSIDERATION[1]

(Name of movant), (status, for example, appellant), moves the Wisconsin Court of Appeals for reconsideration, pursuant to Wis. Stat. § 809.24, of its decision dated _____, _____.

[State with particularity the points of law or fact alleged to be erroneously decided in the decision or order and include supporting argument.]

Dated: _____, _____

(Firm name)
Electronically signed by
[Type name on this line or, if signing the document with a pen and scanning the document, remove the phrase "Electronically signed by"]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] Counsel must file the motion electronically with the clerk of the court of appeals within 20 days after the date of a decision. Wis. Stat. § 809.24(1). A response to a motion for reconsideration is not permitted unless ordered by the court. *Id.* The motion and response are limited to 5 pages if a monospaced font or handwriting is used or 1,100 words if a proportional serif font is used. *Id.* The time to file a motion for reconsideration cannot be extended. *See* Wis. Stat. § 809.82(2)(e).

Form 24. Petition to Bypass Court of Appeals (APP-0027) [Wis. Stat. §§ 808.05, 809.60]

SUPREME COURT OF WISCONSIN

(Use caption assigned
by the court of appeals)

Appeal No. _____

PETITION TO BYPASS COURT OF APPEALS[1]

(Petitioner's name), (status, e.g., appellant), petitions the Supreme Court of Wisconsin, pursuant to Wis. Stat. §§ 808.05 and 809.60, to bypass the Court of Appeals and to take jurisdiction to review this appeal directly. This appeal is from a (judgment) (order) entered on _____, _____, in the circuit court for _____ County, Judge (circuit court judge's name) presiding, in which the court (describe judgment or order).

The reasons supporting bypass of the Court of Appeals are:

[State (a) the issues presented by the controversy, (b) the facts necessary for an understanding of the issues, and (c) the reasons for bypassing the court of appeals. A matter appropriate for bypass is usually one that meets one or more of the criteria for review under Wis. Stat. § 809.62(1r) and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted when there is a clear need to hasten the ultimate appellate decision.[2]]

[1] A $195 filing fee must be paid to the clerk of the supreme court using the electronic payment system or by making arrangements with the clerk of court. Wis. Stat. §§ 809.25(2)(a)1., 809.801(7)(a). The petition must be filed electronically (i.e., e-filed) by attorneys and voluntary e-filers (also referred to as *electronic parties* or *e-filing parties*) using the procedures outlined in Wis. Stat. § 809.801, but self-represented litigants who are not e-filers (i.e., *paper parties*) can file a single paper copy of the petition using the procedures outlined in Wis. Stat. § 809.80. E-filers are served through the e-filing system, but all paper parties must be served by traditional methods. Wis. Stat. §§ 809.80(2)(e), 809.801(6)(c). See Wis. Stat. § 809.60 for the time periods for filing. An opposing party can file a response within 14 days after service of the petition. Wis. Stat. § 809.60(2). Captions, except as provided in Wis. Stat. § 809.81(8) "or when 'petitioner' has been substituted for an individual's name in the caption in an appeal from a domestic abuse protective order or harassment injunction, or when the clerk has given notice of a different caption," must include the full name of each party in the circuit court and must designate each party so as to identify each party's status in the circuit court and in the appellate court. Wis. Stat. § 809.81(9).

[2] Wis. Sup. Ct. IOP III.B.2 (Apr. 20, 2023); *see supra* ch. 27.

Dated: _____, _____

(Firm name)

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

Form 25. Petition for Review (APP-0028) [Wis. Stat. §§ 808.10, 809.62]

SUPREME COURT OF WISCONSIN

(Use caption from court of appeals)

Appeal No. _____

PETITION FOR REVIEW[1]

(Firm name)

(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone number)
(Attorney's email address)

[1] The time periods for filing a petition for review are set forth in Wis. Stat. §§ 808.10 and 809.62(1m). If a petition is not timely received by the clerk of the supreme court, the court loses subject-matter jurisdiction. The objection is not subject to waiver and will be raised on the court's own motion. *First Wis. Nat'l Bank of Madison v. Nicholaou*, 87 Wis. 2d 360, 364, 274 N.W.2d 704 (1979). For paper filers, filing is only accomplished when the petition is physically received in the supreme court clerk's office. Wis. Stat. § 809.80(3); *Gunderson v. State*, 106 Wis. 2d 611, 318 N.W.2d 779 (1982). The time limit for the clerk's receipt of a petition for review filed by a self-represented person confined in an institution is tolled on the date that the person delivers a correctly addressed petition to the proper institutional authorities for mailing. Wis. Stat. § 809.80(3)(e). The petition must conform to the formatting and pagination requirements of Wis. Stat. §§ 809.801(8), 809.62(4), and 809.19(8)(b) and (bm). Captions, except as provided in Wis. Stat. § 809.81(8) "or when 'petitioner' has been substituted for an individual's name in the caption in an appeal from a domestic abuse protective order or harassment injunction, or when the clerk has given notice of a different caption," must include the full name of each party in the circuit court and must designate each party so as to identify each party's status in the circuit court and in the appellate court. Wis. Stat. § 809.81(9). The caption of a document filed in the supreme court must designate that the party filing a petition for review is the "petitioner." *Id.*

A $195 filing fee must be paid to the clerk of the supreme court using the electronic payment system or by making arrangements with the clerk of court. Wis. Stat. §§ 809.25(2)(a)1., 809.801(7)(a). The petition must be filed electronically (i.e., e-filed) by attorneys and voluntary e-filers (also referred to as *electronic parties* or *e-filing parties*) using the procedures outlined in Wis. Stat. § 809.801, but self-represented litigants who are not e-filers (i.e., *paper parties*) can file a single paper copy of the petition using the procedures outlined in Wis. Stat. § 809.80. E-filers are served through the e-filing system, but all paper parties must be served by traditional methods. Wis. Stat. §§ 809.80(2)(e), 809.801(6)(c). An opposing party may file a response within 14 days after service of the petition. Wis. Stat. § 809.62(3) (describing the recommended contents of a response).

TABLE OF CONTENTS[2]

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Table of Authorities ____

Introduction ____

Statement of the Issues Presented for Review ____

Statement of the Criteria Supporting Review ____

Statement of the Case ____

Argument ____

I. (Heading of each argument) ____

II. (Heading) ____

III. (Heading) ____

Conclusion ____

Appendix ____

Certification of Form and Length of Petition for Review[3] ____

[2] The petition must contain a table of contents, which should appear on the first page of the petition. *See* Wis. Stat. § 809.62(2)(b). The table of contents usually follows the form for briefs under Wis. Stat. § 809.19(1)(a).

[3] *See* Wis. Stat. §§ 809.62(4), 809.19(8g).

TABLE OF AUTHORITIES[4]

CASES Page

Able Co. v. Smith, __ Wis. 2d __, __ N.W.2d (____)..... _____

Big v. Jones, __ U.S. __ (____)..... _____

Caplan v. Taylor, __ Wis. 2d __, __ N.W.2d __ (____)..... _____

Carson v. Lake, __ WI __, __ Wis. 2d __, __ N.W.2d ____..... _____

Dale v. Johnson, __ WI App __, __ Wis. 2d __, __ N.W.2d ____..... _____

STATUTES

Wis. Stat. § 808.10 (____)..... _____

Wis. Stat. § 809.62(1r)(a) (____)..... _____

Wis. Stat. § 809.62(1r)(c) (____)..... _____

[4] There is no requirement for including a table of cases, statutes, or other authorities. It may be included if desired.

INTRODUCTION

(Petitioner's name) petitions the Supreme Court of Wisconsin, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the decision[5] of the Wisconsin Court of Appeals, District ____, in (case name), appeal no. _____, filed on _____, _____.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[The petition must contain a statement of the issues presented for review, how they were raised in the court of appeals, and how the court decided the issues. It must identify all issues that the petitioner seeks to have reviewed, including any issues not decided by the court of appeals. Wis. Stat. § 809.62(2)(a). The issues are generally framed as one-sentence questions and numbered.]

1. [State issue #1]

   Answered by the circuit court: (Yes) (No)

   Answered by the court of appeals: (Yes) (No)

2. [State issue #2]

   Answered by the circuit court: (Yes) (No)

   Answered by the court of appeals: (Yes) (No)

3. [Continue for all issues]

STATEMENT OF THE CRITERIA SUPPORTING REVIEW

[This section should contain a concise statement of the criteria from Wis. Stat. § 809.62(1r) on which the petitioner is relying, or in the absence of those criteria, a concise statement of other substantial and compelling reasons for review. Wis. Stat. § 809.62(2)(c).]

---

[5] Note that the decision must be final and adverse. Wis. Stat. § 809.62; *Henderson v. Rock Cnty. Dep't of Soc. Servs. (In the Int. of A.R.)*, 85 Wis. 2d 444, 270 N.W.2d 581 (1978).

STATEMENT OF THE CASE

[This section provides the supreme court with a statement of the case including a description of the nature of the case; the procedural status of the case leading up to the review; the dispositions in the circuit court and court of appeals; and a statement of those facts not included in the opinion of the court of appeals relevant to the issues presented for review, with appropriate citation to the record, e.g., "(R.10 at 15)."][6]

ARGUMENT

[The argument section amplifies the reasons relied on to support the petition. The argument section lets the petitioner elaborate on the criteria for review. The arguments must be arranged in the same order as the statement of issues presented. All contentions in support of the petition must be set forth in the petition, and no additional memoranda are permitted.]

I. [Heading]

[Argument]

II. [Heading]

[Argument]

III. [Heading]

[Argument]

[6] Note that crime victims should be referred to by initials, pseudonyms, or designations. Wis. Stat. § 809.86.

CONCLUSION

For the foregoing reasons, (petitioner's name) respectfully requests that the court grant this petition for review.

Dated: _____, _____

(Firm name)[7]

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[7] In a petition for review of an appeal in a termination-of-parental-rights case, if there is a petitioner other than the state, the petitioner (parent) must sign the petition for review, as must the parent's counsel, if any. *See* Wis. Stat. § 809.107(6)(f). To comply with the confidentiality provisions in Wis. Stat. § 809.81(8), a redacted signature may be necessary. Attorneys should contact the clerk of the supreme court for guidance on how to comply with the parental-signature requirement.

APPENDIX[8]

[The appendix must contain the following items in the order listed:

1. The decision and opinion of the court of appeals.

2. The judgments, orders, findings of fact, conclusions of law, and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition.

3. Any other portions of the record necessary for an understanding of the petition.

4. A copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b).]

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Page No.

Decision of the Court of Appeals,
Dated _____, _____.....____

Findings of Fact and Conclusions of Law,
Dated _____, ____, R._____.....____

Oral Decision of Circuit Court, R. _____.....____

[8] *See* Wis. Stat. § 809.62(2)(f).
[9] Although not required, a table of contents for the appendix is often included.

CERTIFICATION[10]

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a [monospaced] [proportional serif] font. The length of this petition is _____ [pages] [words].

Dated: _____

Signed: _____

[10] *See* Wis. Stat. §§ 809.62(4), 809.19(8g). The petition is limited to 35 pages if a monospaced font or handwriting is used or 8,000 words if a proportional serif font is used. Wis. Stat. § 809.62(4).

Form 26. Petition for Leave to Commence Original Action (APP-0029) [Wis. Stat. § 809.70]

SUPREME COURT OF WISCONSIN

State ex rel. (Petitioner's name),

Petitioner

v.

(Respondent's name),

Respondent

PETITION FOR LEAVE TO COMMENCE ORIGINAL ACTION[1]

(Petitioner's name) petitions the Supreme Court of Wisconsin for leave to commence an original action against the respondent for relief as follows:

In support of this petition, petitioner states:

[State (a) the issues presented by the controversy, (b) the facts necessary for an understanding of the issues, (c) a statement of the relief sought, and (d) the reasons why the court should take original jurisdiction.[2]]

Dated: _____, _____

(Firm name)

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] A $195 filing fee must be paid to the clerk of the supreme court using the electronic payment system or by making arrangements with the clerk of court. Wis. Stat. §§ 809.25(2)(a)1., 809.801(7)(a). Service by traditional methods on all parties is required and should precede or be simultaneous with filing. Wis. Stat. §§ 809.70(1), 809.80(2), 801.14. The petitioner also must furnish the court with the names and addresses of other parties and their attorneys; this can be done as an attachment, in a cover letter, or at the end of the petition.

[2] *See* Wis. Stat. § 809.70(1).

Form 27. Petition for Supervisory Writ (Supreme Court) (APP-0030) [Wis. Stat. §§ 809.71, 809.52]

SUPREME COURT OF WISCONSIN

State ex rel. (Petitioner's name),

v.

(_____ Court for

_____ County, the
Hon. _____ Presiding,)

and (all other parties)

PETITION FOR SUPERVISORY WRIT [1]

(Petitioner's name) petitions the Supreme Court of Wisconsin for a supervisory writ of (type of writ, i.e., prohibition or mandamus), directing (state relief sought) on the following grounds:

* [State (a) the issues presented by the controversy, (b) the facts necessary for an understanding of the issues, (c) the reasons why the court should take jurisdiction, and (d) the reasons an appeal is an inadequate remedy. Attach all relevant documents as exhibits, including any relevant circuit court order or decision.]

* [State why it was impractical to seek this writ in the court of appeals or, if the writ petition was filed in the court of appeals, state the disposition made and the reasons given by the court of appeals.]

[1] A person seeking a supervisory writ from the supreme court must first file a petition in the court of appeals unless it is impractical to do so. Wis. Stat. § 809.71(1); *see also* Wis. Stat. § 809.51 (length and procedure for response). A $195 filing fee must be paid to the clerk of the supreme court using the electronic payment system or by making arrangements with the clerk of court. Wis. Stat. §§ 809.25(2)(a)1., 809.801(7)(a). Service by traditional methods on all parties is required and should precede or be simultaneous with filing. Wis. Stat. §§ 809.71(1), 809.80(2), 801.14. The petitioner also must furnish the court with the names and addresses of other parties and their attorneys; this can be done as an attachment, in a cover letter, or at the end of the petition.

[Add if appropriate] Pursuant to Wis. Stat. § 809.52, petitioner further requests that the court (specify desired temporary relief, e.g., granting of stay) pending the disposition of this petition.

[State specific facts showing why temporary relief is necessary.]

Dated: _____, _____

(Firm name)

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

CERTIFICATION[2]

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ 809.51 and 809.71 for a petition produced with a [monospaced] [proportional serif] font. The length of this petition is _____ [pages] [words].

Dated: _____

Signed: _____

[2] *See* Wis. Stat. § 809.51(4). The petition and supporting memorandum must not exceed 35 pages if a monospaced font or handwriting is used or 8,000 words if a proportional serif font is used. Wis. Stat. § 809.51(1).

Form 28. Motion for Reconsideration (Supreme Court) (APP-0031) [Wis. Stat. § 809.64]

SUPREME COURT OF WISCONSIN

(Use caption assigned
by the court of appeals)

Appeal No. _____

MOTION FOR RECONSIDERATION[1]

(Movant's name), (status, e.g., appellant or petitioner), moves the Supreme Court of Wisconsin pursuant to Wis. Stat. § 809.64 for reconsideration of its (judgment) (opinion) dated _____, _____. The grounds for this motion are that

[State with specificity how the court has (a) overlooked a controlling legal precedent, (b) overlooked important policy considerations, or (c) overlooked or misconstrued a controlling or significant fact appearing in the record.[2]]

Dated: _____, _____

(Firm name)

_____
(Attorney's name)

State Bar No. _____

(Attorney's address)
(Attorney's telephone no.)
(Attorney's email address)

[1] This motion must be filed with the clerk of the supreme court within 20 days after the date of the supreme court's decision. Wis. Stat. § 809.64.

[2] *See supra* ch. 27 (Wisconsin Supreme Court Internal Operating Procedures). Note that the court does not reconsider decisions on petitions for review or bypass. *See* Wis. Sup. Ct. IOP III.J. (Apr. 20, 2023).

Appendix F
Wisconsin Rules of Appellate Procedure

Chapter 808 Appeals and Writs of Error

Chapter 809 Rules of Appellate Procedure

Important Notice to Users

The statutes contained in appendix F reflect the law as codified in the 2021–22 Wisconsin Statutes and as amended by acts through 2023 Wis. Act 36 and by Wisconsin Supreme Court orders issued through Oct. 4, 2024. **REMEMBER, when using these statutes you must check for subsequent statutory changes.**

CHAPTER 808

APPEALS AND WRITS OF ERROR

808.01 Definitions.
808.02 Writ of error.
808.03 Appeals to the court of appeals.
808.04 Time for appeal to the court of appeals.
808.05 Bypass.
808.07 Relief pending appeal.
808.075 Permitted court actions pending appeal.
808.08 Further proceedings in trial court.
808.09 Reversal, affirmance or modification of judgment.
808.10 Review by the supreme court.
808.11 Printing specifications.

808.01 Definitions. In this chapter:

(1) "Appeal" means a review in an appellate court by appeal or writ of error authorized by law of a judgment or order of a circuit court.

(2) "Appellate court" means the supreme court under ch. 751 or the court of appeals under ch. 752.

History: 1977 c. 187; 1991 a. 189.

A party that accepts the benefits of a judgment does not waive the right to take an appeal which does not involve a reversal of that part of the judgment under which the benefit was received. Estreen v. Bluhm, 79 Wis. 2d 142, 255 N.W.2d 473.

Because an appeal to the court of appeals is defined under sub. (1) as a review of a judgment or order of a circuit court, the court of appeals does not have the power of appellate review over decisions of a circuit judge acting in a non-judicial capacity. Schoenhofen v. DOT, 231 Wis. 2d 508, 605 N.W.2d 249 (Ct. App. 1999), 99-0629.

808.02 Writ of error. A writ of error may be sought in the court of appeals.

History: 1977 c. 187.

808.03 Appeals to the court of appeals. (1) APPEALS AS OF RIGHT. A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding, and that is one of the following:

(a) Entered in accordance with s. 806.06 (1) (b) or 807.11 (2).

(b) Recorded in docket entries in ch. 799 cases.

(c) Recorded in docket entries in traffic regulation cases prosecuted in, or following a decision in a municipal court, appealed to, circuit court if a person convicted of a violation may be ordered to pay a forfeiture.

(d) Recorded in docket entries in municipal ordinance violation cases prosecuted in, or following a decision in a municipal court, appealed to, circuit court.

(2) APPEALS BY PERMISSION. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;

(b) Protect the petitioner from substantial or irreparable injury; or

(c) Clarify an issue of general importance in the administration of justice.

(3) REVIEW OF AN ORDER DENYING SUPPRESSION OR EXCLUSION OF EVIDENCE. (a) An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a juvenile may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon an admission or a plea of no contest to the allegations in the petition.

(b) An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint.

History: 1977 c. 187; 1979 c. 192; Sup. Ct. Order, 130 Wis. 2d xix (1986); 1995 a. 139, 224; 1997 a. 35; 2009 a. 27; 2015 a. 12.

Cross-reference: See s. 767.217 (2) for appeals involving child support and maintenance.

Judicial Council Note, 1979: Sub. (1) is amended to modify the statutory definition of the final judgment or final order that may be appealed as a matter of right to the court of appeals. Most types of cases decided in circuit court have a final judgment or order entered with the office of clerk of court. Because of the volume of traffic regulation and municipal ordinance violation cases prosecuted in circuit court, the prevailing custom in Wisconsin counties is to only record the dispositions of those cases in docket entries. Requiring counties to meet the present statutory requirement in s. 808.03 (1) for the entry of a final judgment or order in all cases for purposes of having an appealable matter is unnecessarily burdensome and costly. The term "traffic regulation cases" refers to only those traffic violation cases in which the penalty is a civil forfeiture. [Bill 396-S]

Judicial Council Note, 1986: Sub. (1) is amended to clarify that docket entries in small claims and other ch. 799 cases may be final orders from which an appeal may be taken as of right. See 1979 Judicial Council Note to sub. (1). [Re Order eff. 7-1-86]

An appeal cannot be taken from an order before it is entered. Ramsthal Advertising Agency v. Energy Miser, Inc. 90 Wis. 2d 74, 279 N.W.2d 491 (Ct. App. 1979).

The test to determine whether a decision is a final order or judgment is whether the trial court contemplated that any additional formal document would be entered with respect to the matter covered in the decision. Frederick v. City of Janesville, 92 Wis. 2d 685, 285 N.W.2d 655 (1979).

A pretrial order denying a motion to dismiss a 2nd trial on double jeopardy grounds is a final order appealable under sub. (2). State v. Jenich, 94 Wis. 2d 74, 288 N.W.2d 114 (1980).

An order waiving jurisdiction over a juvenile is appealable under sub. (2). State ex rel. A.E. v. Green Lake County Cir. Ct. 94 Wis. 2d 98, 288 N.W.2d 125 (1980).

Under s. 808.03 (2), both the prosecution and defense may seek permissive appeal of nonfinal orders. State v. Rabe, 96 Wis. 2d 48, 291 N.W.2d 809 (1980).

An order denying a motion to dismiss for lack of personal jurisdiction is appealable by permission under s. 808.03 (2). Heaton v. Independent Mortuary Corp., 97 Wis. 2d 379, 294 N.W.2d 15 (1980).

Orders relating to venue are appealable by permission under sub. (2). Aparacor, Inc. v. DILHR, 97 Wis. 2d 399, 293 N.W.2d 545 (1980).

An order enjoining a town from conducting an incorporation referendum under s. 60.81 terminated the only matter in litigation with respect to the town, although ch. 66 incorporation proceedings had not been finally determined by the order. In re Incorporation of Town of Fitchburg, 98 Wis. 2d 635, 299 N.W.2d 199 (1980).

A court order setting aside an administrative order and remanding the case to the administrative agency disposed of the entire matter in litigation and was appealable as of right. Bearns v. DILHR, 102 Wis. 2d 70, 306 N.W.2d 22 (1981).

When a counterclaim for abuse of process, severed for trial, was not yet determined, a judgment dismissing the complaint was not appealable under sub. (1). Brownsell v. Klawitter, 102 Wis. 2d 108, 306 N.W.2d 41 (1981).

An order for a new trial is not appealable as of right. Wick v. Mueller, 105 Wis. 2d 191, 313 N.W.2d 799 (1982).

The last document in litigation should indicate on its face that for purposes of appeal it is a final order or judgment and that no subsequent document is contemplated. Radoff v. Red Owl Stores, Inc. 109 Wis. 2d 490, 326 N.W.2d 240 (1982).

The trial court did not have jurisdiction to award attorney fees after the filing of a notice of appeal of another issue. Hengel v. Hengel, 120 Wis. 2d 522, 355 N.W.2d 846 (Ct. App. 1984).

A court commissioner's order under s. 757.69 (1) dismissing a criminal proceeding was not a "final order" under sub. (1). State v. Trongeau, 135 Wis. 2d 188, 400 N.W.2d 12 (Ct. App. 1986).

An appellate court has no jurisdiction to review the denial of a postconviction motion if there is no final written order denying the motion on file in the clerk of court's office. State v. Malone, 136 Wis. 2d 250, 401 N.W.2d 563 (1987).

A criminal defendant's right to appeal continues after death, regardless of the cause of death. State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411 (1988).

A judgment resolving the merits of a 42 USC 1983 action is final and appealable under sub. (1) although the issues of attorney fees remains unresolved. ACLU v. Thompson, 155 Wis. 2d 442, 455 N.W.2d 268 (Ct. App. 1990).

The circuit court's retained jurisdiction in board of review certiorari actions under s. 70.47(13) does not affect the finality of an order for appeal purposes. Steenberg v. Town of Oakfield, 157 Wis. 2d 674, 461 N.W.2d 148 (Ct. App. 1990).

An appeal of an oral revocation order under s. 343.305 (10) may not be taken under sub. (1). State v. Borowski, 164 Wis. 2d 730, 476 N.W.2d 316 (Ct. App. 1991).

When an appeal is taken as a matter of right, only the final document need be reduced to writing. Nonfinal rulings need not be reduced to writing to be eligible for review under an appeal of a subsequent final order. Jacquart v. Jacquart, 183 Wis. 2d 372, 515 N.W.2d 539 (Ct. App. 1994).

Like a judgment of foreclosure and sale in the case a mortgage, a judgment of strict foreclosure of a land contract is a final judgment that must be appealed from within the time required under s. 808.04. Hackman v. Behm, 207 Wis. 2d 437, 558 N.W.2d 905 (Ct. App. 1996), 95-3315.

An order on the merits of an action is final for purposes of appeal even though a request for litigation expenses is pending. Laube v. City of Owen, 209 Wis. 2d 12, 561 N.W.2d 785 (Ct. App. 1997), 96-2717.

A party may waive the right to appeal in a civil case if the party has caused or induced a judgment to be entered or has stipulated to the entry of judgment. By stipulating to the entry of a conditional judgment, a party could not obtain a mandatory appeal of an interlocutory order. Cascade Mountain, Inc. v. Capitol Indemnity Corp., 212 Wis. 2d 265, 569 N.W.2d 45 (Ct. App. 1997), 96-2562. See also Dyer v. Law, 2007 WI App 137, 302 Wis. 2d 207, 733 N.W.2d 328, 06-2957.

Absconding from a juvenile treatment center was a rejection by the juvenile of the legitimate means afforded for challenging the court order and resulted in the forfeiture of the right to appeal. State v. Lamontae D.M., 223 Wis. 2d 503, 589 N.W.2d 415 (Ct. App. 1998), 98-1700.

The event that triggers the appeal period for a traffic regulation case is the recording of the disposition in the circuit court docket and not the entry of a separate judgment or order in the office of the clerk of circuit court. City of Sheboygan v. Flores, 229 Wis. 2d 242, 598 N.W.2d 307 (Ct. App. 1999), 99-0954.

The court of appeals shall grant all petitions for interlocutory appeal arising from a circuit court summary judgment order denying a state official's claim of qualified immunity under 42 USC 1983 if the order is based on an issue of law. Whether to grant such a petition is discretionary when it arises from a motion to dismiss. Powell v. Cooper, 2001 WI 10, 241 Wis. 2d 153, 622 N.W.2d 265, 98-0012.

In the family law context, an order resolving the merits of a child support dispute, but not an attorney's fee issue, is final within the meaning of sub. (1). Campbell v. Campbell, 2003 WI App 8, 259 Wis. 2d 676, 659 N.W.2d 106, 02-0426.

A circuit court order is a final order when: 1) it disposes of the entire matter in litigation under substantive law, and 2) the circuit court considered it to be the last document it would enter in the litigation. Contardi v. American Family Insurance Co., 2004 WI App 104, 273 Wis. 2d 509, 684 N.W.2d 139, 03-2284.

When an order or a judgment is entered that disposes of all of the substantive issues in the litigation, as to one or more parties, as a matter of law, the circuit court intended it to be the final document for purposes of appeal, notwithstanding the label it bears or subsequent actions taken by the circuit court. If an order for judgment meets this criterion, it is a final order. Any historic distinction between an order and a judgment is not dispositive. Harder v. Pfitzinger, 2004 WI 102, 274 Wis. 2d 324, 682 N.W.2d 398, 03-1817.

An order granting a plea withdrawal is not final because it plainly anticipates further proceedings in the criminal case. Accordingly, the state was not obligated to file an appeal within the 45-day time period and its failure to do so was not waiver. State v. Williams, 2005 WI App 221, 287 Wis. 2d 748, 706 N.W.2d 355, 04-1985.

A document constitutes the final document for purposes of appeal when it: 1) has been entered by the circuit court, 2) disposes of the entire matter in litigation as to one or more parties, and 3) states on the face of the document that it is the final document for purposes of appeal. When a document would otherwise constitute the final document, but for not including a finality statement, courts will construe the document liberally in favor of preserving the right to appeal. Tyler v. The Riverbank, 2007 WI 33, 299 Wis. 2d 751, 728 N.W.2d 686, 05-2336.

Deciding a case in the sense of merely analyzing legal issues and resolving questions of law does not dispose of an entire matter in litigation as to one or more parties. The court must act by explicitly dismissing or adjudging the entire matter in litigation as to one or more parties. In order to "dispose" of the matter under sub. (1), a memorandum decision must contain an explicit statement either dismissing or adjudging the entire matter in litigation as to one or more parties. Wambolt v. Illinois Farmers Insurance Co., 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670, 05-1874.

Effective September 1, 2007, final orders and judgments shall state that they are final for purposes of appeal. A document does not fulfill this requirement with a particular phrase or magic words, but must make clear on its face, that it is the document from which appeal may follow as a matter of right under sub. (1). Absent such a statement, appellate courts should liberally construe ambiguities to preserve the right of appeal. Wambolt v. Illinois Farmers Insurance Co., 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670, 05-1874.

Under *Wambolt*, neither the label of the document nor the circuit court's subsequent action (e.g., entering a judgment) is dispositive of the document's finality. An order may meet the finality criteria, notwithstanding the presence in the order of a reference to a future judgment or the entry of that judgment. Ecker Brothers v. Calumet County, 2008 WI App 81, 312 Wis. 2d 244, 752 N.W.2d 356, 07-2109.

A trial court order remanding a case to an administrative agency was not a final order within the meaning of sub. (1) when it did not contain an explicit statement adjudicating the entire matter in litigation as to any party and it scheduled a hearing upon "return" from the agency for the purpose of reviewing the issues identified for consideration on remand. Citizens For U, Inc. v. DNR, 2010 WI App 21, 323 Wis. 2d 767, 780 N.W.2d 194, 08-2537.

A traffic forfeiture case qualifies as having been "prosecuted in circuit court," within the meaning of sub. (1) (c) when the case has been appealed to the circuit court following an earlier municipal court decision. It follows that a docket entry of the case's disposition constitutes a final appealable judgment under sub. (1) (c). Village of McFarland v. Zetzman, 2012 WI App 49, 340 Wis. 2d 700, 811 N.W.2d 822, 11-1440.

The prevailing party's claim for an award of attorney fees due under a contract does not affect the finality of a judgment or order that disposes of the entire matter in litigation as to one or more of the parties. There is no distinction between a claim for attorney fees based on a contract as opposed to one based on a statute. When the recovery of attorney fees is authorized by a statute or a contract, the attorney fees are litigation "disbursements and fees allowed by law" as set forth in s. 814.04 (2). McConley v. T.C. Visions, Inc., 2016 WI App 74, 371 Wis. 2d 658, 885 N.W.2d 816, 16-0671.

A proceeding to determine whether a defendant is competent is separate and distinct from the defendant's underlying criminal proceeding. Thus, an order that a defendant is not competent to proceed is a final order issued in a special proceeding and is appealable as of right pursuant to sub. (1). State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, 16–2017.

Under *Voss*, 141 Wis. 267 (1910), the test to be applied in determining the nature of any judicial remedy, as regards whether it is a special proceeding, is whether it is a mere proceeding in an action, or one independently thereof or merely connected therewith. The latter two belong to the special class and the other does not. However, under this test, special proceedings need not occur outside of the underlying actions. L.G. v. Aurora Residential Alternatives, Inc., 2019 WI 79, 387 Wis. 2d 724, 929 N.W.2d 590, 18-0656.

An application to stay pursuant to s. 788.02 is a special proceeding within the meaning of sub. (1). When a circuit court addresses such an application, the court resolves an issue separate and distinct from the issues presented in the pending lawsuit, but which is related or connected to that lawsuit. Thus, a circuit court order denying a request to compel arbitration and stay a pending lawsuit is final for the purposes of appeal. L.G. v. Aurora Residential Alternatives, Inc., 2019 WI 79, 387 Wis. 2d 724, 929 N.W.2d 590, 18-0656.

Wisconsin Court of Appeals Appellate Jurisdiction. Klein & Leavell. Wis. Law. Sept. 1991.

Interlocutory Appeals in Wisconsin. Towers, Arnold, Tess-Mattner & Levenson. Wis. Law. July 1993.

Understanding the New Rules of Appellate Procedure. Stephens. Wis. Law. July 2001.

How to Appeal Mid-litigation Decisions. Alderman. Wis. Law. Dec. 2014.

808.04 Time for appeal to the court of appeals. (1) INITIATING AN APPEAL. An appeal to the court of appeals must be initiated within 45 days of entry of a final judgment or order appealed from if written notice of the entry of a final judgment or order is given within 21 days of the final judgment or order as provided in s. 806.06 (5), or within 90 days of entry if notice is not given, except as provided in this section or otherwise expressly provided by law. Time limits for seeking review of a nonfinal judgment or order are established in s. 809.50.

(1m) An appeal by a record subject under s. 19.356 shall be initiated within 20 days after the date of entry of the judgment or order appealed from.

(1s) An appeal under s. 781.10 (2) (d) 5. shall be initiated within 30 days after the date of entry of the judgment or order appealed from.

(2) An appeal under s. 227.60 or 799.445 shall be initiated within 15 days after entry of judgment or order appealed from.

(3) Except as provided in subs. (4) and (7), an appeal in a proceeding under s. 971.17, a criminal case, or a case under ch. 48, 51, 55, 938, or 980 shall be initiated within the time period specified in s. 809.30 (2) or 809.32 (2), whichever is applicable.

(4) Except as provided in sub. (7m), an appeal by the state in a proceeding under s. 971.17, a criminal case under s. 974.05, or a case under ch. 48, 938, or 980 shall be initiated within 45 days of entry of the judgment or order appealed from.

(6) When a party to an action or special proceeding dies during the period allowed for appeal, the time to appeal is the time permitted by law or 120 days after the party's death, whichever is later. If no personal representative qualifies within 60 days after the party's death, any appellant may have a personal representative appointed under s. 856.07 (2).

(7) An appeal by a party other than the state from a judgment or order granting adoption shall be initiated by filing the notice required by s. 809.30 (2) (b) within 40 days after the date of entry of the judgment or order appealed from. Notwithstanding s. 809.82 (2) (a), this time period may not be enlarged.

(7m) An appeal from a judgment or order terminating parental rights or denying termination of parental rights shall be initiated by filing the notice required by s. 809.107 (2) within 30 days after the date of entry of the judgment or order appealed from.

(7p) An appeal from a judgment or order under s. 809.104 shall be initiated by filing the notice required by s. 809.104 (2) (b) within 30 days after the date of entry of the judgment or order appealed from.

(8) If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.

History: 1977 c. 187; 1979 c. 32 s. 92 (9), (14); 1979 c. 89, 221; 1981 c. 152; 1981 c. 314 ss. 130, 146; 1983 a. 183, 219; 1983 a. 491 s. 23; 1985 a. 182 s. 57; Sup. Ct. Order, 130 Wis. 2d xi, xix (1986); Sup. Ct. Order, 136 Wis. 2d xxv (1987); 1989 a. 56 s. 259; 1989 a. 192; 1991 a. 39; Sup. Ct. Order, 168 Wis. 2d xix (1992); 1993 a. 395; 1995 a. 77, 275; 1997 a. 133; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; 2003 a. 47; 2005 a. 293, 434; 2009 a. 26; 2017 a. 58, 258; 2023 a. 16.

NOTE: 2003 Wis. Act 47 contains explanatory notes.

Cross-reference: See s. 809.50 for time to file permissive appeals.

Judicial Council Note, 1983: Sub. (2) requires expedited initiation of appeals in recall and eviction cases as well as cases in which the validity of a state law is attacked in federal district court. Sub. (3) references the appeal deadline for criminal, juvenile, mental commitment and protective placement appeals. Sub. (4) references the appeal deadline for appeals by the state in criminal and children's code cases. [Bill 151-S]

Judicial Council Note, 1986: The amendment to sub. (1) clarifies the time limit for notice of entry by cross-referencing s. 806.06 (5). [Re Order eff. 7-1-86]

Judicial Council Note, 1986: Subs. (3) and (4) are amended by removing references to a repealed statute. Sub. (7) requires a party other than the state to commence an appeal from a judgment or order terminating parental rights or granting an adoption by filing notice of intent to pursue relief in the trial court within 40 days after entry. It also prohibits enlargement of this time by the court of appeals. [Re Order eff. 7-1-87]

Judicial Council Note, 1992: Subsection (8) is analogous to Rule (4) (a) (2) of the Federal Rules of Appellate Procedure. It is intended to avoid the delay, confusion and prejudice which can result from dismissing appeals solely because they are filed before the judgment or order appealed from is entered. Appeals from judgments or orders which have not been entered are still dismissable. [Re Order effective July 1, 1992]

Judicial Council Note, 2001: The word "final" has been inserted before "judgment or order" in sub. (1). The amendment specifies that the 45- or 90-day time limit applies in appeals from final orders and the 14-day time limit in s. 809.50 applies to appeals from nonfinal orders. [Re Order No. 00-02 effective July 1, 2001]

Notice under sub. (1) may not be given before judgment is entered. Sub-Zero Freezer Co. v. Manhattan Life Insurance Co. 90 Wis. 2d 76, 279 N.W.2d 492 (Ct. App. 1979).

When a written notice of entry of judgment showed the incorrect date of entry, the time to appeal was not shortened under sub. (1). Mock v. Czemierys, 113 Wis. 2d 207, 336 N.W.2d 188 (Ct. App. 1983).

To shorten the appeal period under sub. (1), a formal, captioned, and signed notice of entry of judgment stating the date of entry must be filed and served on an opposing party within 21 days of the entry date. Soquet v. Soquet, 117 Wis. 2d 553, 345 N.W.2d 401 (1984).

The date stamped on the judgment did not control as to the date of actual filing. Matter of Estate of Ristau, 144 Wis. 2d 421, 424 N.W.2d 203 (1988).

A summary contempt proceeding is not "prosecuted by the state" and appeal is pursuant to sub. (1). Matter of Contempt in State v. Simmons, 150 Wis. 2d 178, 441 N.W.2d 308 (Ct. App. 1989).

Under sub. (1), notice of entry of judgment must be given within 21 days of the entry of the judgment, not of its signing, consistent with s. 806.06 (5). Linnmar, Inc. v. First Enterprises, 161 Wis. 2d 706, 468 N.W.2d 753 (Ct. App. 1991).

If a motion for reconsideration is filed under s. 805.17 (3), the 45-day time for appeal under sub. (1) applies beginning upon disposal of the motion. Salzman v. DNR, 168 Wis. 2d 523, 484 N.W.2d 337 (Ct. App. 1992).

Strict compliance with the procedures for providing notice of entry of judgment is required. Notice of entry of judgment is ineffective if it was mailed to an incorrect address. Nichols v. Conlin, 198 Wis. 2d 287, 542 N.W.2d 194 (Ct. App. 1995), 95-2776.

Proceedings under ch. 980 are civil and not criminal. State v. Brunette, 212 Wis. 2d 139, 567 N.W.2d 647 (Ct. App. 1997), 96-2351.

When a judge normally presides in one county but is assigned by substitution to a case filed in another county, the filing and entry for appeal purposes occur when the document comes into the possession of the clerk of court in the county in which the case was commenced. State v. Williams, 230 Wis. 2d 50, 601 N.W.2d 838 (Ct. App. 1999), 98-3338.

Sub. (8) is applicable to appeals under s. 66.0703 as the result of the application of s. 801.02 (2), which makes chs. 801 to 847 applicable in all special proceedings. Mayek v. Cloverleaf Lakes Sanitary District #1, 2000 WI App 182, 238 Wis. 2d 261, 617 N.W.2d 235, 99-2895.

An attorney who is sanctioned by the circuit court for misconduct in a client's case must file his or her own notice of appeal in order to challenge the sanction and may not intervene in the client's appeal if the notice of appeal deadline has been missed. Absent the attorney's filing of a notice of appeal, the court of appeals lacks jurisdiction to consider a challenge to a sanction for the attorney's misconduct. Ziebell v. Ziebell, 2003 WI App 127, 265 Wis. 2d 664, 666 N.W.2d 107, 02-2552.

A circuit court order is a final order when: 1) it disposes of the entire matter in litigation under substantive law; and 2) the circuit court considered it to be the last document it would enter in the litigation. Contardi v. American Family Insurance Co. 2004 WI App 104, 273 Wis. 2d 509, 684 N.W.2d 139, 03-2284.

The proper framework in which to examine the finality of the orders in this case issued by the circuit court over the course of postjudgment proceedings following remittitur was by focusing on whether the orders resulted in the immediate transfer of title to property. If an order led to such a result, it was a final order for purpose of appeal and the time for review was immediate. Orlando Residence, Ltd. v. Nelson, 2013 WI App 81, 348 Wis. 2d 565, 834 N.W.2d 416, 12-1528.

808.05 Bypass. The supreme court may take jurisdiction of an appeal or any other proceeding pending in the court of appeals if:

(1) It grants direct review upon a petition to bypass filed by a party;

(2) It grants direct review upon certification from the court of appeals prior to the court of appeals hearing and deciding the matter; or

(3) It, on its own motion, decides to review the matter directly.

History: 1977 c. 187.

808.07 Relief pending appeal. (1) EFFECT OF APPEAL. An appeal does not stay the execution or enforcement of the judgment or order appealed from except as provided in this section or as otherwise expressly provided by law.

(2) AUTHORITY OF A COURT TO GRANT RELIEF PENDING APPEAL. (a) During the pendency of an appeal, a trial court or an appellate court may:

1. Stay execution or enforcement of a judgment or order;
2. Suspend, modify, restore or grant an injunction; or
3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

(am) During the pendency of an appeal, the trial court may hear and determine a motion filed under s. 806.07.

(b) Except as provided in s. 655.27 (5) (a) 3., relief under this subsection may be conditioned upon the filing of an undertaking in the trial court.

(2m) LIMIT ON UNDERTAKING. (a) During the pendency of an appeal of a judgment in any civil action, the court shall set the amount of the undertaking to be furnished by all appellants collectively in order to stay the execution of the judgment during appellate review, but the undertaking shall not exceed $100,000,000.

(b) Notwithstanding par. (a), if an appellee proves by a preponderance of the evidence that an appellant is dissipating assets outside the ordinary course of business to avoid payment of a judgment, a court may enter any order necessary to protect the appellee and may require the appellant to post a bond in an amount not to exceed the amount of the judgment.

(3) UNDERTAKING FOR COSTS. An undertaking for costs is not required unless specifically required by statute, or, except as provided in s. 655.27 (5) (a) 3., by the trial court acting in its discretion.

(4) PROCEEDINGS AGAINST A SURETY. A surety on an undertaking is subject to the jurisdiction of the trial court and irrevocably appoints the clerk of that court as the surety's agent for service of any papers affecting his or her liability on the undertaking. A person may seek to enforce the surety's liability by filing a motion in the action or proceeding in the trial court in which the undertaking was filed.

(5) PUBLIC OFFICIALS. A person or agency suing or being sued in an official public capacity is not required to execute an undertaking as a condition for relief under this section unless, except as provided in s. 655.27 (5) (a) 3., required by the court in its discretion.

(6) SURETIES ON UNDERTAKINGS. A surety shall file with the undertaking an affidavit that the surety has a net worth in property within this state not exempt from execution which exceeds the amount of the undertaking, except as provided in s. 632.17 (2). The respondent may by motion object to the sufficiency of a surety within 14 days after service of a copy of the undertaking.

History: 1977 c. 187; 1979 c. 32; 1979 c. 110 s. 60 (9); 1983 a. 158, 219; Sup. Ct. Order, 130 Wis. 2d xix (1986); 1985 a. 332; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; 2003 a. 105.

Judicial Council Note, 1986: Sub. (2) (am) carries forward the authority of trial courts to hear and determine motions for relief from judgment during the pendency of an appeal. Authority of the appellate court to hear and determine such motions under prior sub. (2) (a) 4. has been repealed. [Re Order eff. 7-1-86]

Judicial Council Note, 2001: Sub. (6) is the first of fifteen statutes scattered throughout the rules in which a 10-day deadline is being changed to a 14-day deadline. Also 7-day deadlines are being changed to 11-day deadlines. Many of the current deadlines in ch. 809 are either 7 or 10 days and are affected by s. 801.15 (1) (b), which excludes "Saturdays, Sundays and holidays" from time periods "less than 11 days." Additionally, many time periods in ch. 809 run from the service of a document, and under s. 801.15 (5) (a), when a document is served by mail, 3 days are added to the prescribed period. The interplay of s. 801.15 and ch. 809 causes many of the time periods in ch. 809 to be substantially longer than the number of days specified in the Rules. The varying time periods have made calculation of the court's deadlines difficult.

The proposed amendment of all of the 7-day or 10-day deadlines to 11 and 14 days, respectively, will remove the impact of s. 801.15 (1) (b) on the Rules of Appellate Procedure. However, there will be little adverse impact on the time actually given to parties. The proposed change will greatly facilitate the court's calculation of deadlines. If circumstances demand a different time period, the court may set an appropriate deadline under s. 809.82 (2) (a). [Re Order No. 00-02 effective July 1, 2001]

A postjudgment order of the circuit court denying a motion under sub. (2) (a) 4. [now sub. (2) (am)] is not reviewable on appeal from the judgment. Chicago & North Western Railroad v. LIRC, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979).

Under sub. (1) and s. 808.075 (1), a circuit court has authority to confirm a sheriff's sale even though an appeal of the judgment of foreclosure and sale is pending. Community National Bank v. O'Neill, 157 Wis. 2d 244, 458 N.W.2d 385 (Ct. App. 1990).

A stay pending appeal is appropriate when the moving party: 1) makes a strong showing that it is likely to prevail on the appeal; 2) shows that unless the stay is granted it will suffer irreparable harm; 3) shows that there will be no substantial harm to the other parties; and 4) shows that there will be no harm to the public interest. State v. Gudenschwager, 191 Wis. 2d 432, 529 N.W.2d 225 (1995).

The *Gudenschwager* factors do not provide adequate guidance for granting a stay pending appeal when the judgment sought to be stayed is solely a money judgment. The court must consider: 1) the likelihood of success on appeal; 2) the need to ensure collectibility of the judgment if the appeal is unsuccessful; 3) whether the appellant, if successful, will be able to recover; and 4) the harm to the respondent if the judgment is not paid until the completion of an unsuccessful appeal. Scullion v. Wisconsin Power & Light Co., 2000 WI App 120, 237 Wis. 2d 498, 614 N.W.2d 565, 98-3221.

Even if a statutory lis pendens under s. 840.10 is dissolved, common law lis pendens applies and a purchaser who is a party to the relevant litigation takes the property subject to the outcome of the litigation, including appeals. This section does not affect that result. Gaugert v. Duve, 2001 WI 83, 244 Wis. 2d 691, 628 N.W.2d 861, 98-3004.

In some cases, executions may be stayed, tolling interest, and in other cases, a court may decline such a request for stay. There is no substantial conflict in these differing results. Estate of Matteson v. Matteson, 2008 WI 48, 309 Wis. 2d 311, 749 N.W.2d 557, 05-2607.

In determining whether to grant relief pending appeal, the court of appeals exercises its discretion. The court of appeals should explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review. In this case, the court of appeals erroneously exercised its discretion when the court denied the defendant's motion for relief pending appeal without explaining the reasoning for the discretionary denial decision. State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, 16-2017.

Involuntary medication orders are subject to an automatic stay pending appeal. On a motion to lift an automatic stay, the state must: 1) make a strong showing that it is likely to succeed on the merits of the appeal; 2) show that the defendant will not suffer irreparable harm if the stay is lifted; 3) show that no substantial harm will come to other interested parties if the stay is lifted; and 4) show that lifting the stay will do no harm to the public interest. State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, 16-2017.

When reviewing the likelihood of success on appeal in conducting a stay analysis, a circuit court must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movant will suffer absent the stay. Thus, the greater the potential injury, the less a movant must prove in terms of success on appeal. Waity v. Lemahieu, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263, 21-0802.

In conducting a stay analysis, courts consider whether the movant shows that no substantial harm will come to other interested parties. Courts consider the period of time that the case is on appeal, not any harm that could occur in the future. Courts must consider the extent of harm the non−movant will experience if a stay is entered, but the non−movant is ultimately successful in having the injunction affirmed and reinstated. Thus, the stay analysis is not a mere repetition of any harm analysis conducted by the circuit court when it originally issued an order granting relief, which may consider generally all future harms to the non-movant. Waity v. Lemahieu, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263, 21-0802.

808.075 Permitted court actions pending appeal. (1) In any case, whether or not an appeal is pending, the circuit court may act under ss. 801.18 (16), 804.02 (2), 805.15, 805.16, 805.17 (3), 806.07, 806.08, 806.15 (2), 806.24 (4), 808.07 (1) and (2), and 809.12.

(2) In a case appealed under s. 809.30, the circuit court retains the power to act on all issues until the notice of appeal has been filed with the clerk of the circuit court, except that the circuit court may not act upon any motion to extend a time limit that is specified in s. 809.30. Thereafter, the circuit court may act only as provided in subs. (1) and (4).

(3) In a case not appealed under s. 809.30, the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals. Thereafter, the circuit court may act only as provided in subs. (1) and (4).

(4) The circuit court may act as to the following despite the pendency of an appeal:

(a) In a case under ch. 48:

1. Review of actions by a guardian under s. 48.023.
2. Review of nonsecure custody orders under s. 48.207.
3. Review of secure detention orders under s. 48.208 and secure detention status reviews under s. 48.209 (1) (e).
4. Hearing for child held in custody under s. 48.21 or an adult expectant mother of an unborn child held in custody under s. 48.213.
5. Hearing upon involuntary removal under s. 48.305.
6. Revision of dispositional order under s. 48.363.
7. Extension of dispositional order under s. 48.365, unless s. 48.368 applies.
8. Review of permanency plan under s. 48.38 (5).
9. Release of confidential information under s. 48.396 or 48.78.

9m. Review of the conduct of a guardian under s. 48.9795 (10).

10. Revision of guardianship order under s. 48.977 (6).
11. Termination of guardianship under s. 48.977 (7) or 48.9795 (11), including removal of a guardian.
12. Rescission of a guardianship order under s. 48.978 (2) (L) 4., (m) 2. or (n) or (3) (d) 3. or 4., (j) 2. or 3. or (k) 2. or 3.
13. Appointment of a successor guardian under s. 48.9795 (8).
14. Order for visitation under s. 48.9795 (12).

(b) In a case under ch. 51:

1. Disposition, modification and extension of commitment under s. 51.20 (13).
2. Reexamination of commitment under s. 51.20 (16).
3. Enforcement of patient rights under s. 51.61.
4. Commitment, conditional release, recommitment and discharge under s. 971.17 of a person found not guilty by reason of mental disease or defect.

(c) In a case under ch. 55:

1. Protective placement review under s. 55.18, modification under s. 55.16, or termination under s. 55.17.
2. Hearing required upon transfer under s. 55.15.
3. Enforcement of patient's rights under s. 55.23.

(d) In a case under ch. 767:

1. Revision of orders for legal custody or periods of physical placement under s. 767.41, 767.451, 767.461, or 767.481.
2. Issuance or modification of orders for visitation rights under s. 767.43.
3. Annual adjustment of child or family support under s. 767.553.
4. Revision of judgment or order for child support, maintenance payments or family support payments under s. 767.59 or 767.89.
5. Order for temporary maintenance, temporary child support or for suit money, counsel fees and disbursements in the appellate court under s. 767.273.
6. Property division, where the court has expressly or impliedly reserved jurisdiction, provided the court does not revise or modify its final division of property.
7. Vacation or modification of judgment under s. 767.35 (6).
8. Revocation of judgment under s. 767.35 (7).
9. Enforcement of payments under s. 767.77, 767.804 (3), 767.805 (4), or 767.89.
10. Enforcement of orders under s. 767.78, 767.804 (3), 767.805 (4), or 767.89.
11. Enforcement or modification of assignments under s. 767.513 or 767.75.
12. Enforcement or modification of account transfers under s. 767.76.
13. Determination of charges and issuance of repayment orders under s.767.71.

(e) In a case under chs. 701 or 853 to 879, any matter, unless the appellate court directs the trial court not to act on specific issues or the trial court declines to act because the matter directly affects the issues on appeal.

(f) In a case under ch. 54:

1. Review a bond under s. 54.46 (4) or 54.852 (9).
2. Release of deposited funds under s. 54.46 (4) (b) 3.
4. Appointment of successor guardian under s. 54.54 (1).
5. Approval of guardian's exercise of marital property rights under s. 54.20 (2) (h).
6. Approval of management of property under s. 54.19 or 54.20.

7. Direction for use of estate for benefit of wards under s. 54.19 (4).
8. Examination of annual accounts and assets under ss. 54.62 and 54.66.
9. Removal of guardian under s. 54.68 (4) (d).
10. Determination of petitions for instructions to guardian.
11. Termination of guardianship under s. 54.64.
12. Restoration of specific legal rights under s. 54.64 (2) (c).
13. Authorization of purchase of a home for a ward under s. 54.852 (15) (a).

(fn) In a case under ch. 938:

2. Review of nonsecure custody orders under s. 938.207.
3. Review of secure detention orders under s. 938.208 and secure detention status reviews under s. 938.209 (1) (a) 5.
4. Hearing for juvenile held in custody under s. 938.21.
5. Hearing upon involuntary removal under s. 938.305.
6. Revision of dispositional order under s. 938.363.
7. Extension of dispositional order under s. 938.365, unless s. 938.368 applies.
8. Review of permanency plan under s. 938.38 (5).
9. Release of confidential information under s. 938.396 or 938.78.

(g) In a criminal case:

1. Release on bond under s. 809.31 or 969.01 (2).
2. Modification or revocation of bond under s. 969.01 (2) (e) or 969.08.
3. Imposition of sentence upon revocation of probation under s. 973.10 (2) (a).
4. Determination of sentence credit under s. 973.155.
5. Modification of a condition of probation or extension of probationary term under s. 973.09 (3) (a).
6. Modification of sentence.
7. Commitment, conditional release, recommitment and discharge under s. 971.17 of a person found not guilty by reason of mental disease or defect.

(h) Commitment, supervised release, recommitment, discharge, and postcommitment relief under s. 980.10, 2003 stats., or ss. 980.06, 980.08, 980.09 (4), and 980.101 of a person found to be a sexually violent person under ch. 980.

(5) Notwithstanding the limitations of this section, any party may petition the appellate court for remand to the circuit court for action upon specific issues.

(6) In addition to sub. (5), the appellate court may remand the record to the circuit court for additional proceedings while the appeal is pending.

(7) Upon completion of an action taken by the circuit court under sub. (1), (4), (5) or (6) of this section, the clerk shall send a copy of the judgment or order to the appellate court.

(8) If an appellate court remands the record to the circuit court for additional proceedings under sub. (5) or (6), the appellate court, in the pending appeal, may review the judgment or order that the circuit court enters following remand. If any party is aggrieved by the judgment or order of the circuit court, the party shall file in the appellate court a written statement of objections to the judgment or order within 14 days after the record is returned to the clerk of the appellate court. A party that files a statement of objections need not file an additional notice of appeal or cross-appeal.

History: Sup. Ct. Order, 146 Wis. 2d xiii (1988); 1989 a. 86; 1993 a. 16, 446, 479, 481; 1995 a. 38, 73, 77, 275; 1997 a. 35, 191, 292, 296, 334; 1999 a. 9; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; 2001 a. 16; 2005 a. 264, 387, 434; 2005 a. 443 ss. 263, 265; Sup. Ct. Order No. 14-03, 2016 WI 29, 368 Wis. 2d xiii; 2017 a. 365 s. 111;; 2019 a. 95, 109; 2021 a. 238 ss. 44, 45; 2021 a. 240 s. 30.

Judicial Council Note, 1988: In re Marriage of Hengel v. Hengel, 120 Wis. 2d 522, 355 N. W. 2d 846 (Ct. App. 1984), the court of appeals held that since there is no specific statutory exception, the trial court had no competence to enter an order requiring the husband to contribute to his wife's attorney's fees for representation in the trial court after a notice of appeal had been filed. Section 808.075 is created to specify the actions that may be taken in circuit court after a notice of appeal has been filed in cases appealed under s. 809.30 and after transmittal of the record to an appellate court in other cases.

Matters affecting trusts and estates have historically been treated as a series of special proceedings, and the trial court is charged with ongoing supervision and administrative duties affecting such matters. Because of the ongoing involvement of the trial court, sub. (4) (e) reserves full competence to act, unless it is determined that competence should be restricted as to specific issues. [Re Order effective Jan. 1, 1989]

Judicial Council Note, 2001: The second sentence in sub. (2) is a codification of *State v. Harris*, 149 Wis. 2d 943, 440 N.W.2d 364 (1989). Subsection (8) is intended to clarify procedure following a remand and to eliminate an additional notice of appeal or cross-appeal. The obligations of a person filing a statement of objections are the same as those of a cross-appellant. [Re Order No. 00-02 effective July 1, 2001]

An indigent in a civil case is entitled to waiver of transcript fees on appeal if the trial judge finds that the indigent has arguable reason to believe that he or she is entitled to redress on appeal. State ex rel. Girouard v. Jackson County Circuit Court, 155 Wis. 2d 148, 454 N.W.2d 792 (1990).

Under s. 808.07 (1) and sub. (1), a circuit court has authority to confirm a sheriff's sale even though appeal of judgment of the foreclosure and sale is pending. Community National Bank v. O'Neill, 157 Wis. 2d 244, 458 N.W.2d 385 (Ct. App. 1990).

When the court of appeals remands an appeal to the trial court for a *Girouard* determination, the court of appeals has jurisdiction to review the trial court decision without need for filing a 2nd notice of appeal. State v. Jacobus, 167 Wis. 2d 230, 481 N.W.2d 642 (Ct. App. 1992).

808.08 Further proceedings in trial court. When the record and remittitur are received in the trial court:

(1) If the trial judge is ordered to take specific action, the judge shall do so as soon as possible.

(2) If a new trial is ordered, the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar.

(3) If action or proceedings other than those mentioned in sub. (1) or (2) is ordered, any party may, within one year after receipt of the remitted record by the clerk of the trial court, make appropriate motion for further proceedings. If further proceedings are not so initiated, the action shall be dismissed except that an extension of the one-year period may be granted, on notice, by the trial court, if the order for extension is entered during the one-year period.

History: 1977 c. 187.

"Further proceedings" under s. 801.58 (7) and sub. (3) have the same definition. State ex rel. Ondrasek v. Calumet Circuit Court, 133 Wis. 2d 177, 394 N.W.2d 912 (Ct. App. 1986).

A "specific action" under sub. (1) is one that requires no exercise of discretion by the trial court. "Further proceedings" under sub. (3) are those requiring the exercise of discretion by the trial court. State ex rel. J.H. Findorff v. Circuit Court for Milwaukee County, 2000 WI 30, 233 Wis. 2d 428, 608 N.W.2d 679, 97-3452.

In the absence of a remand order in the mandate line or some other clear directive from the appellate court ultimately deciding the appeal, a trial court whose judgment or final order has been affirmed by the appellate court on the merits has no authority to reopen the case for an amended complaint. Tietsworth v. Harley-Davidson, Inc. 2007 WI 97, 303 Wis. 2d 94, 735 N.W.2d 418, 04-2655.

808.09 Reversal, affirmance or modification of judgment. Upon an appeal from a judgment or order an appellate court may reverse, affirm or modify the judgment or order as to any or all of the parties; may order a new trial; and, if the appeal is from a part of a judgment or order, may reverse, affirm or modify as to the part appealed from. In all cases an appellate court shall remit its judgment or decision to the court below and thereupon the court below shall proceed in accordance with the judgment or decision.

History: 1977 c. 187.

The court of appeals may not direct a circuit court to enter a judgment of conviction of a lesser included offense when the jury verdict of guilty on the greater offense is reversed for insufficiency of evidence and the jury was not instructed on the lesser included offense. State v. Myers, 158 Wis. 2d 356, 461 N.W.2d 777 (1990).

The court of appeals has authority to grant a summary judgment motion that was denied by the trial court. Interest of Courtney E., 184 Wis. 2d 592, 516 N.W.2d 422 (1994).

In the absence of a remand order in the mandate line or some other clear directive from the appellate court ultimately deciding the appeal, a trial court whose judgment or final order has been affirmed by the appellate court on the merits has no authority to reopen the case for an amended complaint. Tietsworth v. Harley-Davidson, Inc., 2007 WI 97, 303 Wis. 2d 94, 735 N.W.2d 418, 04-2655.

Unless the supreme court explicitly states otherwise, a court of appeals opinion overruled by the supreme court no longer retains any precedential value. Blum v. 1st Auto & Casualty Insurance Co., 2010 WI 78, 326 Wis. 2d 729, 786 N.W.2d 78, 08-1324.

808.10 Review by the supreme court. **(1)** PETITION FOR REVIEW; TIME LIMIT. A decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court. Except as provided in sub. (2) and ss. 809.32 (5) and 809.62 (1m), the petition for review shall be filed in the supreme court within 30 days of the date of the decision of the court of appeals.

(2) TOLLING PENDING COURT OF APPEALS RECONSIDERATION. If a motion for reconsideration is filed in the court of appeals under s. 809.24 (1) within 20 days after the date of a decision of the court of appeals, the 30-day time period to file the petition for review starts on the date the court of appeals determines the motion for reconsideration by filing an order denying the motion for reconsideration or an amended decision.

History: 1977 c. 187; 1979 c. 192; 2009 a. 25.

Judicial Council Note, 1979: This section is amended to more properly describe the function of the supreme court in reviewing decisions of the court of appeals. The supreme court decides whether to accept jurisdiction of a case from the court of appeals after a petition to review, not a petition to appeal, is filed with the supreme court. See s. 809.62. [Bill 396-S]

"Decision" under this section is the final decision disposing of the case. In Interest of A.R., 85 Wis. 2d 444, 270 N.W.2d 581 (1978).

If a petition is not received by the clerk of the supreme court within 30 days, the court loses subject matter jurisdiction. The objection is not subject to waiver and will be raised on the court's own motion. First Wisconsin National Bank of Madison v. Nicholaou, 87 Wis. 2d 360, 274 N.W.2d 704 (1979).

Untimely service of a petition filed under this section does not affect jurisdiction, but the opposing party may move to dismiss under s. 809.83 (2). State v. Rhone, 94 Wis. 2d 682, 288 N.W.2d 862 (1980).

The 30-day deadline for receipt of a petition for review is tolled on the date that a pro se prisoner delivers a correctly addressed petition to the proper prison authorities for mailing. State ex rel. Nichols v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292, 00-0853. See also Brown v. Bradley, 2003 WI 14, 259 Wis. 2d 630, 658 N.W.2d 427, 01-3324.

Unless the supreme court explicitly states otherwise, a court of appeals opinion overruled by the supreme court no longer retains any precedential value. Blum v. 1st Auto & Casualty Insurance Co. 2010 WI 78, 326 Wis. 2d 729, 786 N.W.2d 78, 08-1324.

Petitions for review by the Wisconsin supreme court. 1979 WLR 1176.

808.11 Printing specifications. Briefs and appendices in cases before the supreme court shall be printed, typed, duplicated or reproduced clearly on paper of permanent quality, and in conformity with such rules as the court may prescribe with regard to organization, binding, color of print, and size of print, paper and margin.

History: 1975 c. 160; 1977 c. 187 s. 83; Stats. 1977 s. 808.11.

CHAPTER 809

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SUBCHAPTER I

DEFINITIONS

809.01 Rule (Definitions). In this chapter:

(1) "Appeal" means a review in an appellate court by appeal or writ of error authorized by law of a judgment or order of a circuit court.

(2) "Appellant" means a person who files a notice of appeal.

(3) "Bookmark" means a hyperlink allowing the reader to quickly navigate to different sections of a document.

(4) "Clerk of court" or "clerk" means the clerk of the supreme court and court of appeals.

(5) "Co-appellant" means a person who files a notice of appeal in an action or proceeding in which a notice of appeal has previously been filed by another person and whose interests are not adverse to that person.

(6) "Converted" means that all documents in a paper case file have been imaged by the clerk of court and the case file is available to accept filings via the electronic filing system.

(7) "Court" means the court of appeals or, if the appeal or other proceeding is in the supreme court, the supreme court.

(8) "Cross-appellant" means a respondent who files a notice of cross-appeal or a respondent who files a statement of objections under s. 808.075 (8).

(9) "Director" means the director of state courts.

(10) "Docketing" means receiving a document and entering its receipt into the court record. A new matter is "docketed" when the clerk accepts an initiating document and creates a new case.

(11) "Document" means a pleading, notice of appeal, petition, writ, form, notice, motion, order, affidavit, exhibit, brief, judgment, opinion, or other filing in an action or proceeding.

(12) "Electronic filing system" means an Internet-accessible system established by the supreme court for the purpose of filing documents in an appellate court, automatically integrating them into the court case management system, and electronically serving them on the parties.

(13) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the document. To be considered electronically signed, a document must be submitted by or on behalf of a user through the

electronic filing system. An electronic signature shall state "Electronically signed by" followed by the name of the signatory, and shall be placed where the person's signature would otherwise appear. "Electronic signature" includes only those signature technologies specifically approved by the director.

(14) "Filing agent" means a person authorized under s. 799.06 (2) to appear on behalf of another.

(15) "High-volume filing agent" means a person authorized under s. 799.06 (2) who appears on behalf of an entity filing 10 or more actions per calendar year in the circuit courts of this state.

(16) "Hyperlink" means a link allowing the reader to quickly navigate to a location within or external to the document.

(17) "Imaged document" means an electronic copy of a document originally created or submitted on paper.

(18) "Initiating document" means a notice of appeal, petition, complaint, certification from the court of appeals, pre-appeal motion, or any other document filed to commence an action or proceeding in the appellate court.

(19) "Mandatory user" means a user who is subject to s. 809.801 (3) (a).

(20) "Monospaced font" means a font in which each character uses an equal amount of horizontal space.

(21) "Notice of activity" means a notice sent by the electronic filing system to alert the parties that there has been a new user, filing, or activity on the case.

(22) "Notice of docketing" means a notice sent by clerk after an appeal or other appellate court proceeding has been initiated that identifies the assigned appellate case number, caption, and court, and that includes relevant information and instructions about the case.

(23) "Opt in" means to agree to receive electronic service and file electronic documents on a particular case, after first registering for access to the electronic filing system.

(24) "Opt out" means to cease participation as a voluntary user or to indicate withdrawal from the case as an attorney.

(25) "Paper party" means a party not subject to s. 809.801 (3) (a) who chooses not to participate in the electronic filing system.

(26) "Portable document format" means a universal file format that preserves the fonts, formatting, pagination, and graphics of a source document.

(27) "Proportional font" means a font in which the horizontal space used by a character varies.

(28) "Registration" means entering into an agreement to access the electronic filing system prior to filing documents under s. 801.18 (3) (d) or 809.801 (3) (d).

(29) "Respondent" means a person adverse to the appellant or co-appellant.

(30) "Serif font" means a font that has short ornaments or bars at the upper and lower ends of the main strokes of the characters.

(31) "Traditional methods" means those methods of filing and serving documents, other than electronic filing, provided under statutes and local rules.

(32) "Transmit" means to send or transfer documents and records from one court to another and may be completed by making the documents and records electronically available to the other court.

(33) "User" means an individual who has registered to use the electronic filing system. Users of the electronic filing system shall be individuals, not law firms, agencies, corporations, or other groups.

(34) "Voluntary user" means a party not subject to s. 809.801 (3) (a) who voluntarily registers to use the electronic filing system under s. 809.801 (3) (b).

(35) "Word" means a group consisting of one or more letters, numbers or symbols with a space or punctuation mark preceding and succeeding the group.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1977 c. 449; Sup. Ct. Order No. 93-20, 179 Wis. 2d xxv (1993); Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 15-02, 2015 WI 102, 365 Wis. 2d xix; Sup. Ct. Order. No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: The definitions reflect some of the changes incorporated into the rules. The term "appeal" applies both to an appeal authorized by statute and the writ of error guaranteed by Section 21 of Article I of the Constitution. The objective of these rules is to provide the same procedure for appeals and writs of error. Historically, the review authorized by a writ of error was limited to questions of law, while both the law and the facts could be reviewed on appeal. The Wisconsin Supreme Court does not distinguish between its power in appeals and in writs of error. Although under the former procedure appeals were normally used in civil cases and writs of error in criminal cases, the only differences between them were in nomenclature and method of initiating the review process. There is no reason to retain the formalistic differences between them.

The definitions of the parties to the appeal are intended to change the former statute, section 817.10, under which the party first appealing was the appellant, and all other parties were respondents. This often resulted in a party with interests identical to the appellant being labeled a respondent, while two parties opposed to each other were both labeled respondents. Under this section the party first appealing is the appellant, parties appealing from the same judgment or order not opposed to the appellant are co-appellants, and parties adverse to the appellant or co-appellant are respondents. The terms "plaintiff in error" and "defendant in error" previously used in connection with writs of error are no longer used. [Re Order effective July 1, 1978]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: The definitions of s. 809.01 have been broadened to incorporate electronic filing terminology.

Understanding the New Rules of Appellate Procedure. Stephens. Wis. Law. July 2001.

SUBCHAPTER II

CIVIL APPEAL PROCEDURE IN COURT OF APPEALS

809.10 Rule (Initiating the appeal). (1) NOTICE OF APPEAL. (a) *Filing*. A person shall initiate an appeal by filing a notice of appeal with the clerk of the circuit court in which the judgment or order appealed from was entered. The clerk of the circuit court may not refuse to accept a notice of appeal for failure to pay the appellate court filing fee required by s. 809.25 (2) (a).

(b) *Content*. The notice of appeal shall include all of the following:

1. The circuit court case name and number.
2. An identification of the judgment or order from which the person filing the notice intends to appeal and the date on which it was entered.
3. A statement of whether the appeal arises in one of the types of cases specified in s. 752.31 (2).
4. A statement of whether the appeal is to be given preference in the circuit court or court of appeals pursuant to statute.
5. If the appeal is under s. 809.30 or 809.32, a statement of the date of service of the last transcript or copy of the circuit court case record if no postconviction motion is filed, the date of the order deciding postconviction motions, or the date of any other notice-of-appeal deadline that was established by the court of appeals.
6. If counsel is appointed under ch. 977, a copy of the order appointing counsel.

(d) *Docketing statement*. The person shall file in the circuit court a completed docketing statement on a form prescribed by the court of appeals. The docketing statement shall accompany the notice of appeal. Docketing statements need not be filed in appeals brought under s. 809.105, 809.107, 809.32, or 974.06 (7), in cases under ch. 980, or in cases in which a party represents himself or herself. Docketing statements need not be filed in appeals brought under s. 809.30 or 974.05, or by the state or defendant in permissive appeals in criminal cases pursuant to s. 809.50, except that docketing statements shall be filed in cases arising under ch. 48, 51, 55, or 938.

(e) *Time for filing*. The notice of appeal must be filed within the time specified by law. The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal.

(f) *Error in content not jurisdictional defect*. An inconsequential error in the content of the notice of appeal is not a jurisdictional defect.

(g) *Motions under s. 809.41 (1) (a) or (4)*. A motion for an order or other relief under s. 809.41 (1) (a) or (4), if any, shall be filed in the circuit court and shall accompany the notice of appeal.

(h) *Service*. For electronic filing users in the circuit court case, receipt of the notice of appeal, docketing statement, and motions filed under s. 809.41 (1) or (4) through the circuit court electronic filing system under s. 801.18 shall constitute service of the documents. Where service on the attorney general is required by s. 809.802 (1), service shall be made as provided in s. 809.802 (2). The appellant shall serve paper parties in the circuit court by traditional methods.

(i) *Filing in court of appeals*. Subject to s. 809.12, other than the notice of appeal, docketing statement, appellant's motion under s. 809.41 (1) or (4), if any, and statement on transcript under s. 809.11 (4) (b), which shall be filed in the circuit court, all subsequently filed documents in an appeal shall be filed in the court of appeals.

(2) MULTIPLE APPEALS. (a) *Joint and co-appeals*. If 2 or more persons are each entitled to appeal from the same judgment or order entered in the same action or proceeding in the trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may, after filing separate notices of appeal, proceed as a single appellant. If the persons do not file a joint appeal or elect to proceed as a single appellant, or if their interests are such as to make joinder impracticable, they shall proceed as appellant and co-appellant, with each co-appellant to have the same procedural rights and obligations as the appellant.

(b) *Cross-appeal*. A respondent who seeks a modification of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding shall file a notice of cross-appeal within the period established by law for the filing of a notice of appeal, or 30 days after the filing of a notice of appeal, whichever is later. A cross-appellant has the same rights and obligations as an appellant under this chapter.

(3) CONSOLIDATED APPEALS IN SEPARATE CASES. The court may consolidate separate appeals in separate actions or proceedings in the trial court upon its own motion, motion of a party, or stipulation of the parties.

(4) MATTERS REVIEWABLE. An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 390 s. 252; Sup. Ct. Order, 123 Wis. 2d xix (1985); Sup. Ct. Order, 131 Wis. 2d xv (1986); 1987 a. 403; Sup. Ct. Order, 161 Wis. 2d xiii (1991); Sup. Ct. Order No. 93-19, 179 Wis. 2d xxiii; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; 2005 a. 434; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Cross-reference: See also s. 767.217 (2) for appeals involving child support and maintenance.

Court of Appeals Note, 1986: Sub. (1) (a) is amended to require appellants to file a docketing statement in the court of appeals on a form prescribed by the court at the time the notice of appeal is filed in the trial court. The docketing statement will provide the court with information for its expedited appeals program pursuant to s. 809.17 and the rules and procedures set forth in Section VII, Expedited Appeals, of the Court of Appeals Internal Operating Procedures (amended March 1, 1986). Docketing statement forms are available in the offices of clerks of the circuit courts. [Re Order effective January 1, 1987]

Judicial Council Committee's Note, 1978: Sub. (1) (a) establishes the same procedure for initiating a review by the Court of Appeals whether it be the statutory appeal or constitutional writ of error. Both are begun by filing a notice of appeal in the trial court. The prior procedure under which a person could obtain a writ of error from the Supreme Court and then file it in the trial court at his leisure is eliminated. It is important to recognize that the right to seek review by writ of error as established by the Constitution is not abolished, but the procedure for seeking that review is made uniform with that for filing an appeal.

The second sentence of sub. (1) (b) is designed to change the law as declared in former s. 817.11 (4), and the decisions of the Supreme Court interpreting former s. 269.59 (1), under which the Supreme Court was vested with subject matter jurisdiction when an appealable order was entered. Under former s. 817.11 (4), the notice of appeal was necessary only to confer personal jurisdiction which could have been waived. The court often had to decide whether the respondent by some conduct, such as signing a stipulation or receiving a brief, had waived any objection to personal jurisdiction. The result was that a judgment of a trial court in Wisconsin was never completely final because even after the expiration of the time for an appeal a party could still appeal, and if the respondent failed to object or take some step that could be considered as participating in the appeal prior to objecting, the Supreme Court was able to review the judgment. This section conforms Wisconsin practice to that in the federal system and most other states.

Sub. (2) (a) provides that appellants whose interests are substantially identical may proceed jointly or separately. See Rule 3 (b), Federal Rules of Appellate Procedure (FRAP). If they do not wish to proceed jointly, or their interests are not the same, or if they are challenging from the same judgment or order, the subsequent appeal should be docketed with the first appeal, but the second person appealing has the same procedural rights, such as filing of briefs, as the first appellant. The respondent has separate briefing rights as to each appellant and co-appellant filing a separate brief. It is anticipated under this section that all appeals arising out of the same case filed within the same appeal period will be considered in a single appeal and not be treated as separate cases in the Court of Appeals.

Sub. (2) (b). The respondent who desires to challenge a judgment or order must file a notice of cross-appeal. Notices of review are abolished. Under former s. 817.12, it was very difficult to ascertain when a notice of review or cross-appeal was appropriate. Requiring a notice of cross-appeal in each instance eliminates this confusion. The respondent is given a minimum of 30 days after the filing of the notice of appeal to determine whether to file a cross-appeal. As was the case under former s. 817.12, a respondent loses the right to cross-appeal if the cross-appeal is not filed within the specified time.

Sub. (3). Appeals from judgments or orders in separate cases in the trial court are docketed as separate appeals in the Court of Appeals. If appropriate, these cases can be consolidated after docketing by order of the Court of Appeals. Rule 3 (b), FRAP.

Sub. (4). The provision of former s. 817.34 that an appeal from a final judgment brings before the court for review all of the prior orders entered in the case is continued. This does not apply, however, to any prior final order or judgment which could have been appealed as of right under s. 808.03 (1). Thus a judgment dismissing a codefendant from a case must be appealed immediately and cannot be reviewed when judgment is rendered on the plaintiff's claim against the other defendants. Nonfinal orders and judgments that are appealed and ruled upon by the Court of Appeals are, of course, not subject to further review upon appeal of the final judgment. This section is also limited to those orders made in favor of the named respondents to prevent the possibility of the court reviewing an order in favor of a person not a party to the appeal.

A change is made in prior law in that an interlocutory judgment, Rule 806.01 (2), which previously must have been appealed within the statutory period from the entry of the interlocutory judgment, Richter v. Standard Manufacturing Co., 224 Wis. 121, 271 N.W. 14 (1937), is now reviewable by the Court of Appeals upon an appeal of the final judgment. The objective is to have only one appeal in each case, absent unusual circumstances which would justify an appeal from a nonfinal order under s. 808.03 (2). [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1981: To facilitate the efficient administration of appeals by the court of appeals, sub. (1) (a) is amended to require that the notice of appeal state whether the appeal is in one of the types of cases specified in s. 752.31 (2). [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: Former sub. (1) (a) has been repealed and recreated as subs. (1) (a) to (d). Subsection 1 (d) clarifies when a docketing statement must be filed. Former sub. (1) (b) has been repealed and recreated as sub. (1) (e). Subsection (1) (f) codifies existing law. See *Northridge Bank v. Community Eye Care Ctr.*, 94 Wis. 2d 201, 203, 287 N.W.2d 810, 811 (1980); *Carrington v. St. Paul Fire & Marine Ins. Co.*, 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267, 269 n.2 (1992). Please see s. 809.32 for special requirements for a Notice of Appeal in a No-Merit Report appeal. [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: See also related changes in ss. 809.40 (3) and 809.50 (3). Prior to 2001 WI 39, effective 7/1/01, s. 809.10 (1) provided that docketing statements were not required in "criminal cases or in cases in which a party appears pro se." State's appeals in criminal cases were inadvertently omitted from the list of statutory references that replaced "criminal cases" in the prior statute. Subsection (1) (d) is amended to clarify that docketing statements are not required in state's appeals in criminal cases. The amendment also clarifies that docketing statements are not required in permissive appeals in criminal cases, but are required in other permissive appeals. [Re Order No. 02-01 effective January 1, 2003]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Sub. (1) (a) adds a provision codifying Douglas v. Dewey, 147 Wis. 2d 328, 338, 433 N.W.2d 243 (1989), holding that payment of the appellate filing fee under s. 809.25 (2) (a) 1. is not a prerequisite to filing a notice of appeal.

To facilitate the adoption of electronic filing and service, three documents will be filed and served in the circuit court case either with the notice of appeal or shortly thereafter: docketing statement, statement on transcript, and optional motions under s. 809.41 (1) and (4). Circuit court electronic filing users are served when they receive these documents through the circuit court electronic filing system. When the attorney general is made a party by operation of s. 809.802 (1), the attorney general will be served through the appellate electronic filing system. Subsequent documents will be filed and served via the appellate electronic filing system.

When an appeal is pending, matters not directly concerned with the appeal but related to the case are still properly within the trial court's jurisdiction. In Matter of Trust Estate of Schaefer, 91 Wis. 2d 360, 283 N.W.2d 410 (Ct. App. 1979).

The filing date stamped on the notice of appeal is not conclusive as to the date of filing. Boston Old Colony Insurance Co. v. International Rectifier Corp., 91 Wis. 2d 813, 284 N.W.2d 93 (1979).

A respondent was allowed to challenge a trial court order denying a motion for summary judgment despite the failure to file a notice of cross-appeal. Auric v. Continental Casualty Co., 111 Wis. 2d 507, 331 N.W.2d 325 (1983).

Service of the notice of appeal on opposing parties is not necessary to confer jurisdiction on the court of appeals. Rhyner v. Sauk County, 118 Wis. 2d 324, 348 N.W.2d 588 (Ct. App. 1984).

Failure to submit the docketing fee within the time specified for filing a notice of appeal does not deprive the court of appeals of jurisdiction. The notice of appeal, not the docketing fee, vests the court with jurisdiction. Douglas v. Dewey, 147 Wis. 2d 328, 433 N.W.2d 243 (1989).

The federal prohibition against stacking cross-appeals is not applicable under sub. (2) (b). The time limits under sub. (1) (b) are jurisdictional and may not be extended. Estate of Donnell v. Milwaukee, 160 Wis. 2d 529, 466 N.W.2d 670 (Ct. App. 1991).

A nonlawyer may not sign and file a notice of appeal on behalf of a corporation. To do so constitutes practicing law without a license in violation of s. 757.30 and voids the appeal. Requiring a lawyer to represent a corporation in filing the notice is constitutional. Jadair Inc. v. United States Fire Insurance Co., 209 Wis. 2d 187, 561 N.W.2d 718 (1997), 95-1946.

Section 799.06 (2) authorizes a non-lawyer employee to represent a party to a small claims action at the appellate, as well as trial court, level and is an exception to the rule stated in *Jadair*. Holz v. Busy Bees Contracting, Inc., 223 Wis. 2d 598, 589 N.W.2d 633 (Ct. App. 1998), 98-1076.

The failure to sign a notice of appeal can be corrected and does not compel immediate dismissal. State v. Seay, 2002 WI App 37, 250 Wis. 2d 761, 641 N.W.2d 437, 00-3490.

Section 753.016 (1) and (2) provide that in Milwaukee County each branch of the circuit court shall have a deputy clerk provided by the clerk of the circuit court. In Milwaukee County "the clerk of the trial court" under sub. (1) (a) necessarily encompasses the deputy clerk assigned to the specific branch of the circuit court as well as deputy clerks performing duties within the office of the clerk of circuit court. Kelley v. State, 2003 WI App 81, 261 Wis. 2d 803, 661 N.W.2d 854, 02-1495.

Appeal of a judgment, the date of which was specified in the notice of appeal, included an appeal of an order for costs entered after that date. A judgment is perfected by the taxation of costs and the insertion of the amount into the judgment so that the order of costs becomes part of the judgment subject to appeal. DeWitt Ross & Stevens v. Galaxy Gaming and Racing, 2003 WI App 190, 267 Wis. 2d 233, 670 N.W.2d 74, 02-0359.

Affirmed on other grounds. 2004 WI 92, 273 Wis. 2d 577, 682 N.W.2d 839, 02-0359.

In order to confer jurisdiction on the court of appeals, a notice of appeal filed by counsel must contain the handwritten signature of an attorney authorized to practice law in Wisconsin. Counsel cannot delegate the duty to affix a signature on a notice of appeal to a person not authorized to practice law in Wisconsin. When a notice of appeal is not signed by an attorney when an attorney is required, the notice of appeal is fundamentally defective and cannot confer jurisdiction. Brown v. MR Group, LLC, 2004 WI App 121, 274 Wis. 2d 804, 683 N.W.2d 804, 03-2309.

The plaintiffs in this case were not "respondents" under sub. (4) because they were not named in the notice of appeal, and thus were not "respondents" adverse to the appellants. The appellants could not name the plaintiffs as respondents in the notice of appeal because the appellants were not aggrieved by any final order entered against the appellants and in favor of the plaintiffs. The appellants could not evade the bar to appealing non-final-orders as of right by the expedient of appealing final orders against those named in the notice of appeal in order to get review of non-final orders and rulings favorable to parties who were still active in the litigation. Dixon v. Hnilicka Company, Inc. 2011 WI App 46, 332 Wis. 2d 357, 798 N.W.2d 264, 09-1953.

Applying well-established principles of law that apply equally to the United States government when it is a party, a decision not to litigate any of the issues involved in the circuit court precludes the United States from pursuing relief in the court of appeals. Nickel v. United States, 2012 WI 22, 339 Wis. 2d 48, 810 N.W.2d 450, 11-0987.

Mechanics of Making an Appeal in the Court of Appeals. Felsenthal, WBB Oct. 1981.

Appellate review: Choosing and shaping the proper standard. Leavell. WBB Apr. 1987.

Changing standards of appellate review. Leavell. WBB May 1987.

809.103 Appeals in proceedings related to prisoners. (1) In this section, "prisoner" has the meaning given in s. 801.02 (7) (a) 2.

(2) The appellate court shall notify the department of justice by a procedure developed by the director of state courts in cooperation with the department of justice when the appellate court rules that an appeal or supervisory writ proceeding brought by a prisoner meets any of the following conditions:

(a) Is frivolous, as determined under s. 802.05 (2) or 895.044.

(b) Is used for any improper purpose, such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation.

(c) Seeks review of a denial of monetary damages from a defendant who is immune from such relief.

(d) There is no ground upon which relief may be granted.

(3) A prisoner is not relieved from paying the full filing fee related to an appeal or supervisory writ proceeding if the appellate court dismisses the appeal or supervisory writ proceeding for one of the reasons listed in sub. (2).

History: 1997 a. 133; Sup. Ct. Order No. 03-06A, 2005 WI 86, 280 Wis. 2d xiii; 2011 a. 2.

809.104 Appeal of decisions relating to electronics and information technology manufacturing zone. (1) APPLICABILITY. This section applies to the appeal of a judgment or order vacating, enjoining, reviewing, or otherwise relating to a decision by a state or local official, board, commission, condemnor, authority, or department concerning an electronics and information technology manufacturing zone designated under s. 238.396 (1m) and supersedes all inconsistent provisions of this chapter.

(2) APPEAL AS OF RIGHT. (a) Notwithstanding s. 808.03 (1), an appeal from a judgment or order of the trial court vacating, enjoining, reviewing, or otherwise relating to a decision by a state or local official, board, commission, condemnor, authority, or department concerning an electronics and information technology manufacturing zone designated under s. 238.396 (1m) may be taken to as a matter of right and is governed by this section.

(b) A party may initiate an appeal under this section by filing a notice of appeal with the clerk of the trial court in which the order or judgment appealed from was entered and shall specify in the notice of appeal the order or judgment appealed from. The docketing statement required under s. 809.10 (1) (d) shall be filed in the circuit court and shall accompany the notice of appeal. The appellant shall pay the filing fee with the notice of appeal. The clerk of the circuit court shall transmit to the court of appeals, within 3 days after the filing of the notice of appeal, the docketing statement, a copy of the notice of appeal, and a copy of the circuit court record of the case maintained under s. 59.40 (2) (b) or (c).

(bm) The clerk of the court of appeals shall file the appeal upon receipt of the items referred to in par. (b). The clerk shall assign a case number, create a notice that the case has been docketed, and transmit the notice to the clerk of circuit court. The clerk shall serve the notice of docketing on paper parties by traditional methods.

(c) The appellant shall request a copy of the transcript of the court reporter's verbatim record of the proceedings for each of the parties to the appeal and make arrangements to pay for the transcript and copies within 5 days after the filing of the notice of appeal under par. (b).

(d) Within 5 days after filing of the notice of appeal in the circuit court, the appellant shall file a statement on transcript with the clerk of circuit court, who shall transmit the statement on transcript to the court of appeals within 3 days after its filing. The statement on transcript shall either designate the portions of the transcript that have been requested by the appellant or contain a statement by the appellant that a transcript is not necessary for prosecution of the appeal. If a transcript is necessary for prosecution of the appeal, the statement on transcript shall also contain a statement by the court reporter that the appellant has requested copies of the transcript or designated portions thereof for each of the other parties; that the appellant has made arrangements to pay for the original transcript and for all copies for the other parties; the date on which the appellant requested the transcript and made arrangements to pay for it; and the date on which the transcript must be served on the parties.

(dm) For electronic filing users in the circuit court case, receipt of the notice of appeal, docketing statement, and statement on transcript through the circuit court electronic filing system shall constitute service of the documents. The appellant shall serve the notice of appeal, docketing statement, and statement on

transcript on paper parties by traditional methods.

(e) The court reporter shall serve copies of the transcript on the parties indicated in the statement on transcript within 5 days after the date the appellant requested copies of the transcript under par. (c).

(f) Subsequent proceedings in the appeal are governed by the procedures for civil appeals and the procedures under subch. VI, except as follows:

1. The appellant shall file a brief within 15 days after the filing of the record on appeal.

2. The respondent shall file a brief within 10 days after the service of the appellant's brief.

3. The appellant shall file within 10 days after the service of the respondent's brief a reply brief or statement that a reply brief will not be filed.

4. Within 3 days of receipt of the appellant's reply brief or statement that a reply brief will not be filed under subd. 3., the court of appeals shall certify the appeal to the supreme court under s. 809.61.

5. The supreme court shall give preference to a certification from the court of appeals under this section. If the supreme court refuses to take jurisdiction of the appeal certified to it by the court of appeals under this section, the appeal shall continue in the court of appeals as though the certification had not been made.

(3) STAY PENDING APPEAL. Any judgment or order of a circuit court vacating, enjoining, reviewing, or otherwise relating to a decision by a state or local official, board, commission, condemnor, authority, or department concerning an electronics and information technology manufacturing zone designated under s. 238.396 (1m) shall be stayed automatically upon the filing of an appeal as provided under this section. Any party to the proceeding may apply to the appellate court in which the case is pending at the time to request that the stay be modified or vacated.

History: 2017 a. 58; Sup. Ct. Order No. 19-01, 2019 WI 44, 386 Wis. 2d xvii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

809.105 Appeals in proceedings related to parental consent prior to performance of abortion. (1) APPLICABILITY. This section applies to the appeal of an order under s. 48.375 (7) and supersedes all inconsistent provisions of this chapter.

(2) INITIATING AN APPEAL. Only a minor may initiate an appeal under this section. The minor shall initiate the appeal by filing, or by a member of the clergy filing on the minor's behalf, a notice of appeal with the clerk of the trial court in which the order appealed from was entered and shall specify in the notice of appeal the order appealed from. The minor may use the name "Jane Doe" instead of her name on the notice of appeal and all other papers filed with the court of appeals.

(3) PERFECTING THE APPEAL. (a) *Fee*. No fee for filing an appeal in the court of appeals under this section may be required of a minor or of a member of the clergy who files an appeal under this section on behalf of the minor.

(b) *Forwarding to court of appeals*. The clerk of the trial court shall transmit to the court of appeals within 3 calendar days after the filing of the notice of appeal a copy of the notice of appeal and a copy of the trial court case record maintained as provided in s. 59.40 (2) (b), using the name "Jane Doe" instead of the minor's name, and the record on appeal, assembled as provided in sub. (4).

(c) *Docketing in court of appeals*. The clerk of the court of appeals shall docket the appeal immediately upon receipt of the items specified in par. (b). The clerk shall assign a case number, create a notice that the case has been docketed, and transmit the notice to the clerk of circuit court. The clerk shall serve the notice of docketing on paper parties by traditional methods.

(d) *Statement on transcript*. A minor or member of the clergy may not be required to file a statement on transcript in an appeal under this section.

(4) RECORD ON APPEAL. The record in an appeal under this section consists of the following:

(a) The petition.

(b) Proof of service of the notice of hearing.

(c) The findings of fact, conclusions of law and final order of the trial court.

(d) Any other order made that is relevant to the appeal and the documents upon which that other order is based.

(e) Exhibits, whether or not received in evidence, including photographs, video recordings, audio recordings, and computer media such as discs or flash drives, except that physical evidence, models, charts, diagrams, and photographs exceeding 8.5 x 11 inches in size shall not be included unless requested by the minor to be included in the record.

(f) Any other document filed in the trial court that the minor requests to have included in the record.

(g) The notice of appeal.

(h) A transcript of the court reporter's verbatim record.

(i) The certificate of the clerk.

(j) If the trial court appointed a guardian ad litem under s. 48.235 (1) (d), a letter written to the court of appeals by the guardian ad litem indicating his or her position on whether or not the minor is mature and well-informed enough to make the abortion decision on her own and whether or not the performance or inducement of an abortion is in the minor's best interests.

(5) TRANSCRIPT OF COURT REPORTER'S VERBATIM RECORD. At the time that a minor or member of the clergy files a notice of appeal, the minor or member of the clergy shall make arrangements with the reporter for the preparation of a transcript of the court reporter's verbatim record of the proceedings under s. 48.375 (7). The reporter shall file the transcript with the trial court within 2 calendar days after the notice of appeal is filed. The county of the court that held the proceeding under s. 48.375 (7) shall pay the expense of transcript preparation under this subsection.

(6) VOLUNTARY DISMISSAL. A minor may dismiss an appeal under this section by filing a notice of dismissal in the court of appeals.

(7) BRIEFS. Briefs are not required to be filed in appeals under this section.

(8) Assignment and advancement of cases. The court of appeals shall take cases appealed under this section in an order that ensures that a judgment is made within 4 calendar days after the appeal has been filed in the court of appeals. The time limit under this subsection may be extended with the consent of the minor and her counsel, if any, or the member of the clergy who initiated the appeal under this section, if any.

(8m) Oral argument. If the court of appeals determines that a case appealed under this section is to be submitted with oral argument, the oral argument shall be held in chambers or, on motion of the minor through her counsel or through the member of the clergy who filed the appeal under this section, if any, or on the court of appeals' own motion, by telephone, unless the minor through her counsel or the member of the clergy demands that the oral argument be held in open court.

(9) Costs. The court of appeals may not assess costs against a minor or member of the clergy in an appeal under this section.

(10) Remittitur. (a) A judgment by the court of appeals under this section is effective immediately, without transmittal to the trial court, as an order either granting or denying the petition. If the court of appeals reverses a trial court order denying a petition under s. 48.375 (7), the court of appeals shall immediately so notify the minor by personal service on her counsel or the member of the clergy who initiated the appeal under this section, if any, of a certified copy of the order of the court of appeals granting the minor's petition. If the court of appeals affirms the trial court order, it shall immediately so notify the minor by personal service on her counsel or the member of the clergy who initiated the appeal under this section, if any, of a copy of the order of the court of appeals denying the petition and shall also notify the minor by her counsel or the member of the clergy who initiated the appeal under this section on behalf of the minor, if any, that she may, under sub. (11), file a petition for review with the supreme court under s. 809.62. The court of appeals shall pay the expenses of service of notice under this subsection. The clerk of the court of appeals shall transmit to the trial court the judgment and opinion of the court of appeals and the record in the case filed under sub. (4), within 31 days after the date that the judgment and opinion of the court of appeals are filed. If a petition for review is filed under sub. (11), the transmittal shall be made within 31 days after the date that the supreme court rules on the petition for review.

(b) Counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall immediately, upon notification under par. (a) that the court of appeals has granted or denied the petition, notify the minor. If the court of appeals has granted the petition, counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall hand deliver a certified copy of the order of the court of appeals to the person who intends to perform or induce the abortion. If with reasonable diligence the person who intends to perform or induce the abortion cannot be located for delivery, then counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall leave a certified copy of the order with the person's agent at the person's principal place of business. If a clinic or medical facility is specified in the petition as the corporation, partnership or other unincorporated association that employs the person who intends to perform or induce the abortion, then counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall hand deliver a certified copy of the order to an agent of the corporation, partnership or other unincorporated association at its principal place of business. There may be no service by mail or publication. The person or agent who receives the certified copy of the order under this paragraph shall place the copy in the minor's medical record.

(11) Petition for review in supreme court. (a) Only a minor or the member of the clergy who initiated the appeal under this section, if any, may initiate a review of an appeal under this section. The petition for review of an appeal in the supreme court shall contain:

1. A statement of the issues presented for review and how the issues were decided by the trial court and court of appeals.
2. A brief statement explaining the reason for appeal to the supreme court.
3. The judgment and opinion of the court of appeals, and the findings of fact, conclusions of law and final order of the trial court that were furnished to the court of appeals. The court of appeals shall provide a copy of these papers to the minor, if any, the member of the clergy who initiated the appeal under this section, if any, her counsel or her guardian ad litem, if any, immediately upon request.
4. A copy of any other document submitted to the court of appeals under sub. (4).

(b) The supreme court shall decide whether or not to grant the petition for review and shall decide the issue on review within the time specified in par. (c).

(c) The supreme court shall, by court rule, provide for expedited appellate review of cases appealed under this subsection because time may be of the essence regarding the performance of the abortion.

(cm) If the supreme court determines that a case reviewed under this subsection is to be submitted with oral argument, the oral argument shall be held in chambers or, on motion of the minor through her counsel or through the member of the clergy who initiated the appeal under this section, if any, or on the supreme court's own motion, by telephone, unless the minor through her counsel or the member of the clergy demands that the oral argument be held in open court.

(d) A judgment or decision by the supreme court under this section is effective immediately, without transmittal to the trial court, as an order either granting or denying the petition. If the supreme court reverses a court of appeals order affirming a trial court order denying a petition under s. 48.375 (7), the supreme court shall immediately so notify the minor by personal service on her counsel, if any, or on the member of the clergy who initiated the appeal under this section, if any, of a certified copy of the order of the supreme court granting the minor's petition. If the supreme court affirms the order of the court of appeals, it shall immediately so notify the minor by her counsel or by the member of the clergy who initiated the appeal under this section, if any. The clerk of the supreme court shall transmit to the trial court the judgment, or decision, and opinion of the supreme court and the complete record in the case within 31 days after the date that the judgment, or decision, and opinion of the supreme court are filed. The supreme court shall pay the expense of service of notice under this subsection.

(e) Counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall immediately, upon notification under par. (d) that the supreme court has granted or denied the petition, notify the minor. If the supreme court has granted the petition, counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall hand deliver a certified copy of the order of the supreme court to the person who intends to perform or induce the abortion. If with reasonable diligence the person who intends to perform or induce the abortion cannot be located for delivery,

then counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall leave a certified copy of the order with the person's agent at the person's principal place of business. If a clinic or medical facility is specified in the petition as the corporation, partnership or other unincorporated association that employs the person who intends to perform or induce the abortion, then counsel for the minor, if any, or the member of the clergy who initiated the appeal under this section, if any, shall hand deliver a certified copy of the order to an agent of the corporation, partnership or other unincorporated association at its principal place of business. There may be no service by mail or publication. The person or agent who receives the certified copy of the order under this paragraph shall place the order in the minor's medical record.

(12) CONFIDENTIALITY AND ANONYMITY. All proceedings in the court of appeals and the supreme court that are brought under this section shall be conducted in a confidential manner, and the minor may use the name "Jane Doe" instead of her name on all papers filed with either court. The identity of the minor involved and all records and other papers pertaining to an appeal shall be kept confidential, except as provided in s. 48.375 (7) (e).

(13) CERTAIN PERSONS BARRED FROM PROCEEDINGS. No parent, or guardian or legal custodian, if one has been appointed, or foster parent, if the minor has been placed in a foster home, and the minor's parent has signed a waiver granting the department of children and families, a county department under s. 46.215, 46.22 or 46.23, or the foster parent the authority to consent to medical services or treatment on behalf of the minor, or adult family member, as defined in s. 48.375 (2) (b), of any minor who has initiated an appeal under this section may attend or intervene in any proceeding under this section.

History: 1991 a. 263, 315; 1993 a. 213, 446; 1995 a. 27 s. 9126 (19); 1995 a. 201, 224; 2007 a. 20; 2009 a. 28; Sup. Ct. Order No. 15-02, 2015 WI 102, 365 Wis. 2d xix; 2017 a. 365 s. 111; Sup. Ct. Order No. 19-01, 2019 WI 44, 386 Wis. 2d xvii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

NOTE: Sup. Ct. Order No. 15-02 states: The Comments to Wis. Stat. ss. 809.105 (3) and 809.15 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

Comment, 2015: Effective July 1, 2016, the Wisconsin Supreme Court amended the Rules of Appellate Procedure to permit the clerk of circuit court to transmit the record to the appellate court electronically. The amendment applies to record transmittals due on or after July 1, 2016. [Re: Order No. 15-02 effective July 1, 2016]

809.107 Appeals in proceedings related to termination of parental rights. (1) APPLICABILITY. This section applies to the appeal of an order or judgment under s. 48.43 and supersedes all inconsistent provisions of this chapter.

(1m) DEFINITION. In this section, "appellant" means a person who files a notice of intent to pursue postdisposition or appellate relief.

(2) APPEAL OR POSTDISPOSITION MOTION. (am) *Appeal procedure; counsel to continue*. A person seeking postdisposition or appellate relief shall comply with this section. If the person desires to pursue postdisposition or appellate relief, counsel representing the person during circuit court proceedings under s. 48.427 shall continue representation by filing a notice under par. (bm), unless sooner discharged by the person or by the circuit court.

(bm) *Notice of intent to pursue postdisposition or appellate relief*. A person shall initiate an appeal under this section by filing, within 30 days after the date of entry of the judgment or order appealed from, as specified in s. 808.04 (7m), a notice of intent to pursue postdisposition or appellate relief with the clerk of the circuit court in which the judgment or order appealed from was entered. Also within that time period, the appellant shall serve a copy of the notice of intent on the person representing the interests of the public, opposing counsel, the guardian ad litem appointed under s. 48.235 (1) (c) for the child who is the subject of the proceeding, the child's parent and any guardian and any custodian appointed under s. 48.427 (3m). If the record discloses that final adjudication occurred after the notice of intent was filed, the notice shall be treated as filed after entry of the judgment or order appealed from on the day of the entry of the final judgment or order. The notice of intent shall include all of the following:

1. The circuit court case name, number, and caption.

2. An identification of the judgment or order from which the appellant intends to seek postdisposition or appellate relief and the date on which the judgment or order was entered.

3. The name and address of the appellant and the appellant's trial counsel.

4. For an appellant other than the state, whether the trial counsel for the appellant was appointed by the state public defender and, if so, whether the appellant's financial circumstances have materially improved since the date on which the appellant's indigency was determined.

4m. Whether the appellant requests representation by the state public defender for purposes of postdisposition or appellate relief.

5. For an appellant other than the state, who does not request representation by the state public defender, whether the appellant will represent himself or herself or will be represented by retained counsel. If the appellant has retained counsel to pursue postdisposition or appellate relief, counsel's name and address shall be included.

6. For an appellant other than the state, the signature of the appellant on whose behalf the notice of intent is filed. Appellant's counsel, if any, shall also sign the notice, but may not sign in lieu of the appellant.

(c) *Early notice of intent to pursue postdisposition or appellate relief*. If the record discloses that the judgment or order appealed from was entered after the notice of intent to pursue postdisposition or appellate relief was filed, the notice of intent shall be treated as filed after that entry and on the date of the entry.

(3) CLERK TO SEND MATERIALS. Within 5 days after a notice under sub. (2) (bm) is filed, the clerk of the circuit court shall do all of the following:

(a) If the appellant requests representation by the state public defender for purposes of postdisposition or appellate relief, the clerk shall send to the state public defender's appellate intake office a copy of the notice of intent that shows the date on which the notice was filed, a copy of the judgment or order specified in the notice that shows the date on which the judgment or order was entered, a list of the court reporters for each proceeding in the action in which the judgment or order was entered, and a list of those proceedings for which a transcript already has been filed with the clerk of circuit court.

(b) If the appellant does not request representation by the state public defender, the clerk shall send or furnish to the appellant, if the appellant is appearing without counsel, or to the appellant's attorney, if one has been retained, a copy of the judgment or order specified in the notice that shows the date on which the

judgment or order was entered, a list of the court reporters for each proceeding in the action in which the judgment or order was entered, and a list of those proceedings in which a transcript already has been filed with the clerk of circuit court.

(4) Request for transcript and circuit court case record. (a) *State public defender appointment of counsel*. Within 15 days after the state public defender appellate intake office receives the materials from the clerk of circuit court under sub. (3) (a), the state public defender shall appoint counsel for the appellant and request a transcript of the court reporter's verbatim record and a copy of the circuit court case record.

(b) *Person not represented by public defender*. An appellant who does not request representation by the state public defender for purposes of postdisposition or appellate relief shall request a transcript of the court reporter's verbatim record, and may request a copy of the circuit court case record within 15 days after filing the notice of intent under sub. (2) (bm). An appellant who is denied representation by the state public defender for purposes of postdisposition or appellate relief shall request a transcript of the court reporter's verbatim record, and may request a copy of the circuit court case record, within 30 days after filing a notice of intent under sub. (2) (bm).

(4m) Filing and service of transcript and circuit court case record. The court reporter shall file the transcript with the circuit court and serve a copy of the transcript on the appellant within 30 days after the transcript is requested. The clerk of circuit court shall serve a copy of the circuit court case record on the appellant within 30 days after the case record is requested, and shall indicate in the case record the date and manner of service.

(5) Notice of appeal. (a) *Filing; and service of notice of appeal*. Within 30 days after the later of the service of the transcript or the circuit court case record, unless extended under s. 809.82, the appellant shall file a notice of appeal as provided in s. 809.10 and serve a copy of the notice on the persons required to be served under sub. (2) (bm). For an appellant other than the state, the appellant on whose behalf the notice of appeal is filed shall sign the notice. Appellant's counsel, if any, shall also sign the notice of appeal, but may not sign in lieu of the appellant. Within 3 days after the filing of the notice of appeal, the clerk of circuit court shall transmit to the court of appeals the notice of appeal and a copy of the circuit court record of the case maintained pursuant to s. 59.40 (2) (b) or (c).

(ag) *Docketing in court of appeals*. The clerk of the court of appeals shall docket the appeal upon receipt of the notice of appeal. The clerk shall assign a case number, create a notice that the case has been docketed, and transmit the notice to the clerk of circuit court. The clerk shall serve the notice of docketing on paper parties by traditional methods.

(am) *Notice of abandonment of appeal*. If the person who filed a notice of intent to appeal under sub. (2) and requested a transcript and case record under sub. (4) decides not to file a notice of appeal, that person shall notify the person required to be served under sub. (2) of this decision, within 30 days after the service of the transcript and case record under sub. (4).

(b) *Transmittal of record by clerk*. The clerk of circuit court shall transmit the record to the court of appeals as soon as the record is prepared, but in no event more than 15 days after the filing of the notice of appeal.

(c) *Requesting transcripts for other parties*. The appellant shall request a copy of the transcript of the court reporter's verbatim record of the proceedings for each of the parties to the appeal and make arrangements to pay for the transcript and copies within 5 days after the filing of the notice of appeal.

(d) *Statement on transcript*. Within 5 days after filing the notice of appeal in the circuit court, the appellant shall file a statement on transcript with the clerk of circuit court, who shall transmit the statement on transcript to the clerk of the court of appeals within 3 days after its filing. The statement on transcript shall either designate the portions of the transcript that have been requested by the appellant or contain a statement by the appellant that a transcript is not necessary for prosecution of the appeal. If a transcript is necessary for prosecution of the appeal, the statement on transcript shall also contain a statement by the court reporter that the appellant has requested copies of the transcript or designated portions thereof for each of the other parties; that the appellant has made arrangements to pay for the original transcript and for all copies for other parties; the date on which the appellant requested the transcript and made arrangements to pay for it; and the date on which the transcript must be served on the parties.

(dm) *Service for electronic filing users*. For electronic filing users in the circuit court case, receipt of the notice of appeal and statement on transcript through the circuit court electronic filing system shall constitute service. The appellant shall serve the notice of appeal and statement on transcript on paper parties by traditional methods.

(e) *Service of transcript on other parties*. The court reporter shall serve copies of the transcript on the parties indicated in the statement on transcript within 5 days after the date the appellant requested copies of the transcript under par. (c).

(5m) No-merit reports. A s. 809.32 no-merit report, response, and supplemental no-merit report may be filed in an appeal from an order or judgment terminating parental rights. The appointed attorney shall file in the court of appeals and serve on the client-parent the no-merit report and certification within 15 days after the filing of the record on appeal. The appointed attorney shall serve on the client-parent a copy of the transcript and the record on appeal at the same time that the no-merit report is served on the client-parent. The client-parent may file in the court of appeals a response to the no-merit report within 10 days after service of the no-merit report. The attorney may file a supplemental no-merit report and affidavit within 10 days after receiving the response to the no-merit report.

(6) Subsequent proceedings in court of appeals; petition for review in supreme court. Subsequent proceedings in the appeal are governed by the procedures for civil appeals and the procedures under subch. VI, except as follows:

(a) *Appellant's brief-in-chief*. The appellant shall file a brief within 15 days after the filing of the record on appeal.

(am) *Motion for remand*. If the appellant intends to appeal on any ground that may require postjudgment fact-finding, the appellant shall file a motion in the court of appeals, within 15 days after the filing of the record on appeal, raising the issue and requesting that the court of appeals retain jurisdiction over the appeal and remand to the circuit court to hear and decide the issue. If the appellant is not represented by counsel, the appellant shall file any motion under this paragraph within 45 days after the filing of the record on appeal. The appellant's counsel or, if the appellant is not represented by counsel, the appellant, shall file an

affidavit in support of the motion stating with specificity the reasons that postjudgment fact-finding is necessary. The person signing the affidavit shall in the affidavit affirm under s. 802.05 (2) that, to the best of his or her knowledge, information, and belief, remand is warranted and is not being sought to cause unnecessary delay. If the court of appeals grants the motion for remand, it shall set time limits for the circuit court to hear and decide the issue, for the appellant to request transcripts of the hearing, and for the court reporter to file and serve the transcript of the hearing. The court of appeals shall extend the time limit under par. (a) for the appellant to file a brief presenting all grounds for relief in the pending appeal.

(b) *Respondent's brief*. The respondent shall file a brief within 10 days after the service of the later of the appellant's brief or the guardian ad litem's brief, if the guardian ad litem takes the position of the appellant.

(c) *Appellant's reply brief*. The appellant shall file within 10 days after the service of the later of the respondent's brief or the guardian ad litem's brief, if the guardian ad litem takes the position of the respondent, a reply brief or statement that a reply brief will not be filed.

(d) *Guardian ad litem's brief*. If the guardian ad litem appointed under s. 48.235 (1) (c) for the child who is the subject of the proceeding takes the position of the appellant, the guardian ad litem's brief shall be filed within 15 days after the filing of the record on appeal with the court of appeals. If the guardian ad litem takes the position of a respondent, the guardian ad litem's brief shall be filed within 10 days after service of the appellant's brief. If the guardian ad litem chooses not to participate in an appeal, the guardian ad litem shall file with the court a statement of reasons for not participating under s. 48.235 (7) within 15 days of the filing of the notice of appeal.

(e) *Decision*. Cases appealed under this section shall be given preference and shall be taken in an order that ensures that a decision is issued within 30 days after the filing of the appellant's reply brief or statement that a reply brief will not be filed.

(f) *Petition for review*. A petition for review of an appeal in the supreme court, if any, shall be filed within 30 days after the date of the decision of the court of appeals. For a petitioner other than the state, the petitioner on whose behalf the petition for review is filed shall sign the petition. Petitioner's counsel, if any, shall also sign the petition for review, but may not sign in lieu of the petitioner. The supreme court shall give preference to a petition for review of an appeal filed under this paragraph.

History: 1993 a. 395; 1995 a. 275; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; 2005 a. 293; Sup. Ct. Order No. 05-07, 2006 WI 37, 287 Wis. 2d xix; Sup. Ct. Order No. 04-08, 2008 WI 108, filed 7-30-08, eff. 1-1-09; 2015 a. 128; Sup. Ct. Order No. 17-05, 2017 WI 95, filed 11-9-17, eff. 7-1-18; 2017 a. 258; Sup. Ct. Order No. 19-01, 2019 WI 44, 386 Wis. 2d xvii; Sup. Ct. .Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21; 2021 a. 240 s. 30.

NOTE: 1993 Wis. Act 395 contains explanatory notes.

Judicial Council Note, 2001: Titles and subtitles were added. Subsection (4) is amended to require that the person who files a notice of intent to appeal must request a copy of the circuit court case record within 15 days after filing the notice of intent to appeal. Subsection (4) also requires the clerk of the circuit court to serve a copy of the circuit court case record upon the person requesting it within 30 days after the date of the request.

Former sub. (5) is recreated as subs. (5) (a) and (b).

Subsection (5) (c) requires the appellant to request a copy of the transcript for the other parties to the appeal, and to make arrangements to pay for those copies, within 5 days after filing the notice of appeal.

Subsection (5) (d) requires the appellant to file a statement on transcript within 5 days after filing the notice of appeal.

Subsection (5) (e) requires the court reporter to serve copies of the transcript on the other parties to the appeal within 5 days after the appellant requests the copies.

Subsection (5m) codifies *Brown County v. Edward C.T.*, 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998), 98-0075, which extends the no-merit procedure to TPR cases.

Subsection (6) (am) provides a procedure for ineffective assistance of counsel claims and other claims that require fact-finding after the final judgment or order has been entered. [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2006: The creation of s. 809.107 (2) (am) requires counsel representing a parent who wants to appeal the TPR disposition to file a notice of intent to pursue postdisposition or appellate relief. Trial counsel's representation continues until the notice of intent is filed.

Section 809.107 (2) (bm) contains the substance of former sub. (2). The amendment adds the case number to the content requirements for the notice of intent. Subsection (2) (bm) 2. deletes a reference to the date on which the judgment or order was granted because the time limits in s. 808.04 (7m) commence on the date the judgment or order was entered.

The amendment to s. 809.107 (2) (c) addresses the practical concern that arises when a notice of intent is filed before the final judgment or order is entered. Similar to s. 808.04(8), the amendment allows the filing date of the notice of intent to be deemed the date that the judgment or order was entered, and thereby preserves appellate jurisdiction.

To facilitate compliance with the time limits in this section, the amendment to (3) requires the clerk to send a copy of the judgment or order that shows the date on which it was entered and a list of transcripts already on file to the state public defender's intake office, or to the person if appearing without counsel, or to retained counsel.

New s. 809.107 (4) (a) codifies existing practice and establishes a time limit for the state public defender to appoint counsel and request transcripts and circuit court case records. The public defender's time limit commences on the date that the public defender's office receives the materials from the circuit court clerk, rather than on the date the notice of intent is filed, so as to reduce the number of extension motions that must be filed when the clerk does not timely send the materials under sub. (3) (a).

The amendment to s. 809.107 (4) (b) clarifies the procedure applicable to persons who are not represented by the state public defender and creates time limits applicable to a person who has applied for and has been denied public defender representation. In the latter case, the rule provides an additional 15 days for the person to obtain private counsel and request a copy of the transcript and case record. The time limit is set at 30 days because 15 days will have expired while the public defender's office determines whether the person is eligible for appointed counsel. This time limit commences on the date the notice of intent was filed, rather than the date of the public defender's determination because that determination does not appear in the case record.

Subsection (4m) includes the last two sentences of former sub. (4). Subsection (4m) also creates a new requirement for the circuit court clerk to indicate the date and manner of service in the case record. The new requirement is necessary because the notice of appeal time limit is measured from the date of service of the case record or transcript, whichever is later.

The amendment to s. 809.107 (5) (a) clarifies that the time limit for filing a notice of appeal commences 30 days from the *later* of the service of the transcript or case record. Persons contemplating filing a notice of appeal are better able to assess grounds for relief after reviewing both the transcripts and the circuit court case record. [Re Order No. 05-07 effective July 1, 2006]

Time limits imposed by the legislature in sub. (6) did not constitute unconstitutional infringements on the judiciary, as they are subject to court modification. Time limits imposed by sub. (5) did not violate constitutional guarantees of due process or effective assistance of counsel. Interest of Christopher D. 191 Wis. 2d 681, 530 N.W.2d 34 (Ct. App. 1995).

The no merit appeal procedure under s. 809.32 and the authority to extend the time for filing a notice of appeal under s. 809.82 (2) do not apply to appeals regarding terminations of parental rights. Gloria A. v. State, 195 Wis. 2d 268, 536 N.W.2d 396 (Ct. App. 1995), 95-0315.

While s. 809.32 relating to no merit reports does not apply to appeals under this section, the filing of a no merit report is not precluded if the notice of intent and notice of appeal under subs. (2) and (5) are timely filed and the report is filed within the time for filing the appellant's brief under sub. (6) (a). Brown County v. Edward C.T. 218 Wis. 2d 160, 579 N.W.2d 293 (Ct. App. 1998), 98-0075.

Despite the express service provisions in this section, service does not initiate the appeal and confer jurisdiction, filing does. Carla B. v. Timothy N. 228 Wis. 2d 695, 598 N.W.2d 924 (Ct. App. 1999), 99-0853.

809.108 Appeals in proceedings related to political subdivision approvals. (1) APPLICABILITY. This section applies to the appeal of a judgment or order under s. 781.10 (2) (d) 5. and supersedes all inconsistent provisions of this chapter.

(2) INITIATING AN APPEAL. A party may initiate an appeal under this section by filing a notice of appeal with the clerk of the circuit court in which the judgment or order appealed from was entered and shall specify in the notice of appeal the judgment or order appealed from.

(3) APPEAL PROCEDURE. Subsequent proceedings in an appeal under this section are governed by the procedures for civil appeals under this subchapter and the procedures under subch. VI, except as follows:

(a) The appellant shall file a brief within 30 days after the filing of the record on appeal.

(b) The respondent shall file a brief within 30 days after the service of the appellant's brief.

(c) The appellant shall file within 15 days after the service of the respondent's brief a reply brief or statement that a reply brief will not be filed.

(4) DECISION. The court of appeals shall give preference to an appeal under this section and shall take the appeal in an order that ensures that the court of appeals issues a decision no later than 90 days after the deadline under sub. (3) (c).

History: 2023 a. 16.

809.11 Rule (Items to be filed and transmitted). (1) FEE. The appellant shall pay the filing fee to the clerk of the court of appeals when the notice of appeal is filed. Payment may be made by check or through the court electronic payment system, unless arrangements are made with the clerk of court or otherwise ordered by the court. An appellant may file with the court of appeals a petition or motion for waiver of the filing fee under s. 814.29 (1) or (1m), using a form provided by the court for that purpose.

(2) TRANSMITTAL OF NOTICE OF APPEAL. The clerk of the circuit court shall transmit to the court of appeals, within 3 days of the filing of the notice of appeal, the notice of appeal, the appellant's docketing statement, the appellant's motion filed under s. 809.41 (1) or (4), if any, and the circuit court record of the case maintained pursuant to s. 59.40 (2) (b) or (c).

(3) DOCKETING IN COURT OF APPEALS. (a) The clerk of the court of appeals shall docket the appeal upon receipt of the items referred to in sub. (2), create a notice of docketing, and transmit the notice of docketing to the clerk of circuit court.

(b) For electronic filing users in the circuit court case, receipt of the notice of docketing through the circuit court electronic filing system shall constitute service of the notice of docketing and notification that the court of appeals proceeding has been commenced. Where service on the attorney general is required by s. 809.802 (1), service shall be made as provided in s. 809.802 (2). The clerk shall serve the notice of docketing on the paper parties by traditional methods.

(4) REQUESTING TRANSCRIPTS AND FILING STATEMENT ON TRANSCRIPT. (a) The appellant shall request a copy of the transcript of the court reporter's verbatim record of the proceedings for each of the parties to the appeal and make arrangements to pay for the transcript and copies within 14 days after the filing of the notice of appeal.

(b) The appellant shall file a statement on transcript with the clerk of the circuit court within 14 days after the filing of the notice of appeal in the circuit court. The statement on transcript shall either designate the portions of the transcript that have been requested by the appellant or contain a statement by the appellant that a transcript is not necessary for prosecution of the appeal. The clerk of circuit court shall transmit the statement on transcript to the court of appeals within 3 days after its filing. If a transcript that is not yet filed in the circuit court is necessary for prosecution of the appeal, the statement on transcript shall also contain a statement by the court reporter that the appellant has requested copies of the transcript or designated portions thereof for each of the other parties; that the appellant has made arrangements to pay for the original transcript and for all copies for other parties; the date on which the appellant requested the transcript and made arrangements to pay for it; and the date on which the transcript must be served on the parties.

(c) For electronic filing users in the circuit court case, receipt of the statement on transcript through the circuit court electronic filing system shall constitute service. Where service on the attorney general is required by s. 809.802 (1), service shall be made as provided in s. 809.802 (2). The appellant shall serve the statement on transcript on paper parties by traditional methods.

(5) ADDITIONAL PORTIONS OF TRANSCRIPT. Within 14 days after filing of a statement on transcript as required under sub. (4), any other party may file in the court of appeals a designation of additional portions to be included in the transcript and serve a copy of the designation on the appellant. Within 14 days after the filing of such a designation, the appellant shall file in the circuit court the statement required by sub. (4) (b) covering the other party's designation. If the appellant fails or refuses to request the designated portions, the other party, within 14 days of the appellant's failure or refusal, may request the portions by filing a statement on transcript in the circuit court or move the circuit court for an order requiring the appellant to request the designated portions.

(6) CROSS-APPEALS. Subsections (4) and (5) apply to cross-appellants.

(7) REPORTER'S OBLIGATIONS. (a) *Service of transcript copies*. The reporter shall serve copies of the transcript on the parties to the appeal, file the transcript with the circuit court, and notify the clerk of the court of appeals and the parties to the appeal that the transcript has been filed and served within 60 days after the

date on which the transcript was requested and arrangements were made for payment under sub. (4). If additional portions of the transcript are requested under sub. (5), the reporter shall serve copies of the additional portions of the transcript on the parties to the appeal, file the additional portions of the transcript with the circuit court, and notify the clerk of the court of appeals and the parties to the appeal that the additional portions of the transcript have been filed and served within 60 days after the date on which the additional portions were requested and arrangements were made for payment. If supplementation or correction of the record is ordered under s. 809.14 (3) (b), the reporter shall serve copies of the supplemental or corrected transcript on the parties to the appeal, file the supplemental or corrected transcript with the circuit court, and notify the clerk of the court of appeals and the parties to the appeal that the supplemental or corrected transcript has been filed and served within 20 days after the order for supplementation or correction is entered or within the time limit set by order of the court. Where service of a transcript on the attorney general is required by s. 809.802 (1), access to an electronic copy of the transcript through the appellate electronic filing system shall constitute service of the transcript.

(b) *Return of statement regarding transcript arrangements*. The reporter shall sign and send to the appellant, within 5 days after receipt, the statement regarding transcript arrangements and filing required under sub. (4) (b).

(c) *Extensions*. A reporter may obtain an extension for filing the transcript only by motion, showing good cause, that is filed in the court of appeals and served on all parties to the appeal, the clerk of the circuit court and the district court administrator.

(d) *Sanctions*. If a reporter fails to timely file a transcript, the court of appeals may declare the reporter ineligible to act as an official court reporter in any court proceeding and may prohibit the reporter from performing any private reporting work until the overdue transcript is filed.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); Sup. Ct. Order, 104 Wis. 2d xi (1981); Sup. Ct. Order, 146 Wis. 2d xiii (1988); 1995 a. 201, 224; 1997 a. 35; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; Sup. Ct. Order No. 15-02, 2015 WI 102, 365 Wis. 2d xix; Sup. Ct. Order No. 19-01, 2019 WI 44, 386 Wis. 2d xvii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: This section requires the forwarding of the notice of appeal, filing fee and trial court docket entries immediately, the record to be forwarded when the transcript is completed. This will permit early notice to the court of the pendency of the appeal and will permit it to monitor the appeal during the period when the record and transcript are being prepared.

Another purpose of this section is to expedite the appellate process by requiring the appellant to order the transcript, if one is necessary, within 10 days of the filing of the notice of appeal. The filing of the statement of the reporter that the transcript has been ordered and arrangements made for payment for it will prevent any delay resulting from counsel not ordering the transcript immediately.

Docket entries are required by s. 59.39 (2) and (3). In order to comply with this section, the docket entries will have to be kept. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (4) is amended to clarify that the statement on transcript that is initiated by the appellant must include information that arrangements have been made for the preparation and payment of copies of the transcript for the other parties to the appeal. The language clarification rectifies a present ambiguity in chapter 809 in regard to who is responsible for initiating the arrangements for preparation and payment of copies of the transcript as compared with just the original. The appellant must make all arrangements for the original and copies of a transcript and is responsible for payment. Cost of the preparation of the transcript is included in allowable costs under s. 809.25. [Re Order effective Jan. 1, 1980]

Judicial Council Committee's Note, 1981: Sub. (4) is amended to require that the appellant file a copy of the statement on transcript with the clerk of the trial court within 10 days of the filing of the notice of appeal. This filing will notify the trial court clerk as to whether a transcript is necessary for prosecution of the appeal and, if so, the date on which the transcript is due. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: The revision places all of the rules concerning transcript preparation and service in one statute, and eliminates the need for former s. 809.16. Subsection (4) combines and recreates former s. 809.11 (4) and the first sentence of former s. 809.16 (1). Subsection (5) recreates the remaining portions of former s. 809.16 (1). The time limits in subs. (4) and (5) are changed from 10 to 14 days. See the comment to s. 808.07 (6) concerning time limits. No other substantive changes in subs. (4) and (5) were intended. Subsection (6) recreates former s. 809.16 (2). Subsection (7) (a) recreates former s. 809.16 (3). Subsection (7) (b) is created to specify a time within which the court reporter must furnish a statement regarding transcript arrangements to the appellant or cross-appellant. Subsection (7) (c) recreates former s. 809.16 (4). Subsection (7) (d) recreates former s. 809.16 (5). [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: Subsection (4) (b) is amended for consistency in terminology and to clarify that the court reporters' statement regarding transcript arrangements, sometimes referred to as the court reporters' certification, is required only for a transcript that has not been filed in circuit court when the statement on transcript is filed, consistent with the clerk of the court of appeals' interpretation and enforcement practices.

Subsection (5) is amended to create a time limit for the completion of the transcript ordering process. If the appellant does not request the preparation of the additional portions of transcript that have been designated by another party within 14 days of the designation, the other party may either request the preparation of the portions from the reporter or move the circuit court for an order requiring the appellant to request the designated portions. This revision creates a 14-day time period for the other party to take action to obtain the additional portions of the record.

Subsection (7) (a) is amended to clarify the time limits for the preparation of additional portions of the transcript requested under s. 809.11 (5), and to require the court reporter to notify the clerk of the court of appeals and the parties to the appeal when a transcript is filed and served.

Subsection (7) (b) is amended to correct the cross-reference to the rule in sub. (4) (b) that requires the reporter to file a statement regarding transcript arrangements.

Subsection (7) (c) is amended to require a court reporter who files a motion to extend the time within which to prepare a transcript to serve a copy of the motion on the clerk of the circuit court and the district court administrator. Early notice that a reporter has requested additional time to prepare a transcript will enable the clerk and the district court administrator to provide workload relief to the reporter if deemed appropriate. [Re Order No. 02-01 effective January 1, 2003]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Sub. (3) codifies the clerk's practice of sending a notice of docketing to inform the parties that the appeal has been filed and providing the case number. The appellate clerk serves the notice of docketing on the electronic parties in the circuit court case, advising them to opt in to the court of appeals case. The appellate clerk also serves the notice of docketing on the attorney general and opts in the attorney general as an attorney for the state.

To facilitate the adoption of electronic filing and service, s. 809.11 (4) requires that the statement on transcript be filed and served in the circuit court case. The statement on transcript must be filed within 14 days of filing the notice of appeal, the docketing statement under s. 809.10 (1) (d), and motions made under s. 809.10 (1) (g), if any.

Failure to submit the docketing fee within the time specified for filing the notice of appeal does not deprive the court of appeals of jurisdiction. The notice of appeal, not the docketing fee, vests the court with jurisdiction. Douglas v. Dewey, 147 Wis. 2d 328, 433 N.W.2d 243 (1989).

809.12 Rule (Motion for relief pending appeal). A person seeking relief under s. 808.07 shall file a motion in the trial court unless it is impractical to seek relief in the trial court. A motion in the court must show why it was impractical to seek relief in the trial court or, if a motion had been filed in the trial court, the reasons given by the trial court for its action. A person aggrieved by an order of the trial court granting the relief requested may file a motion for relief from the order with the court. A judge of the court may issue an ex parte order granting temporary relief pending a ruling by the court on a motion filed pursuant to this rule. A motion filed in the court under this section must be filed in accordance with s. 809.14.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1981 c. 390 s. 252.

809.13 Rule (Intervention). A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal. A party may file a response to the petition within 11 days after service of the petition. The court may grant the petition upon a showing that the petitioner's interest meets the requirements of s. 803.09 (1), (2), or (2m).

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1981 c. 390 s. 252; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; 2017 a. 369.

Judicial Council Committee's Note, 1978: Former s. 817.12 (6) permitted the addition of parties but did not set the criteria for doing so. This void is filled by making the intervention rule in the Rules of Civil Procedure applicable to proceedings in the Court of Appeals. [Re Order effective July 1, 1978]

Judicial Council Note, 2001: The 7-day time limit has been changed to 11 days. Please see the comment to s. 808.07 (6) concerning time limits. [Re Order No. 00-02 effective July 1, 2001]

A party who could have, but failed to, file a timely notice of appeal may not participate in the appeal as an intervenor or by filing a non-party brief. Weina v. Atlantic Mutual Insurance Co. 177 Wis. 2d 341, 501 N.W.2d 465 (Ct. App. 1993).

A non-party to a circuit court action may intervene in an appeal brought by another party, even after the time for filing a notice of appeal has passed. City of Madison v. WERC, 2000 WI 39, 234 Wis. 2d 550, 610 N.W.2d 94, 99-0500.

809.14 Rule (Motions). (1) A party moving the appellate court for an order or other relief in a case shall file a motion for the order or other relief. The motion must state the order or relief sought and the grounds on which the motion is based and may include a statement of the position of other parties as to the granting of the motion. A motion may be supported by a memorandum. Except as provided in sub. (1m), any other party may file a response to the motion within 11 days after service of the motion.

(1m) If a motion is filed in an appeal under s. 809.107, any other party may file a response to the motion within 5 days after service of the motion.

(2) A motion for a procedural order may be acted upon without a response to the motion. A party adversely affected by a procedural order entered without having had the opportunity to respond to the motion may move for reconsideration of the order within 11 days after service of the order.

(3) (a) The filing of a motion seeking an order or other relief which may affect the disposition of an appeal or the content of a brief, a motion seeking consolidation of appeals, a motion for extension of time to file a statement on transcript, or a motion relating to production of transcripts automatically tolls the time for performing an act required by these rules from the date the motion was filed until the date the motion is disposed of by order.

(b) The filing of a motion to supplement or correct the record automatically tolls the time for performing an act required by these rules from the date the motion was filed until the date the motion is disposed of by order. If a motion to correct or supplement the record is granted, time limits for performing an act required by these rules shall be tolled from the date on which the motion was filed until the date on which the supplemental or corrected record return is transmitted to the clerk of the court of appeals, except that the time for preparation of supplemental or corrected transcripts is governed by s. 809.11 (7) (a).

(c) The clerk of the court of appeals shall transmit to the clerk of circuit court a copy of any motion filed in the appellate court under this subsection.

(4) Subsection (3) does not apply in an appeal under s. 809.105.

(5) (a) Any motion for an order or other relief made under sub. (1) before a notice of appeal is filed shall be made in the court of appeals. The clerk of the court of appeals shall assign a pre-appeal case number, create a notice that the case has been docketed, and transmit a copy of the notice of docketing and pre-appeal motion to the clerk of circuit court.

(b) For electronic filing users in the circuit court case, receipt of the notice of docketing and the pre-appeal motion through the circuit court electronic filing system provides access to the pre-appeal proceeding and constitutes service of the pre-appeal motion. Where service on the attorney general is required by s. 809.802 (1), service shall be made as provided in s. 809.802 (2). The clerk shall serve the notice of docketing on paper parties by traditional methods. The movant shall serve the pre-appeal motion on paper parties by traditional methods.

(c) Subsequent pre-appeal motions arising out of the same circuit court case shall be filed and docketed in the same pre-appeal proceeding. The clerk shall transmit a copy of the motions to the clerk of circuit court.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii; 1991 a. 263; 1995 a. 224; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 05-07, 2006 WI 37, 287 Wis. 2d xix; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: The motion procedure under former Rule 251.71 is continued except that the time for replying to a motion is reduced from 10 to 7 days. A response is not required before action can be taken on a procedural motion because these motions include matters previously handled by letter request or which usually do not adversely affect the opposing party. If an opposing party is adversely affected by a procedural order, he has the right to request the court to reconsider it. Procedural orders include the granting of requests for enlargement of time, to file an amicus brief, or to file a brief in excess of the maximum established by the rules. This section is based on Federal Rules of Appellate Procedure, Rule 27. Sub. (3) modifies the prior practice under which the filing of

any motion stayed any due date until 20 days after the motion was decided. This could result in an unintentional shortening of the time in which a brief had to be filed. It could also result in an unnecessary delay if a ruling on the motion would not affect the outcome of the case, the issues to be presented to the court, or a brief or the record. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (1) is amended by deleting a provision that required only an original and one copy of a motion be filed with an appellate court. With the amendment, the number of copies of a motion to be filed is now governed by 809.81 on the form of papers to be filed with an appellate court, which requires in sub. (2) that 4 copies of a paper be filed with the Court of Appeals and 8 copies with the Supreme Court. [Re Order effective Jan. 1, 1979]

Judicial Council Note, 2001: The 7-day time limits in subs. (1) and (2) have been changed to 11 days. Please see the comment to s. 808.07 (6) concerning time limits. Subsection (3) (a) was revised to include consolidation motions within the tolling provision. Subsection (3) (b) creates a tolling provision when a motion to supplement or correct the record is filed. Subsection (3) (c) creates a service requirement for motions affecting the time limits for transmittal of the record. [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2006: The amendment to s. 809.14 (1) and the creation of s. 809.14 (1m) to establish a shorter response time to appellate motions should advance the ultimate resolution of TPR appeals. [Re Order No. 05-07 effective July 1, 2006]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Sub. (3) identifies those motions needed by both the appellate and circuit court and provides for cross-copying to the other court without duplicate filing by the litigants.

Sub. (5) codifies the existing process for filing motions prior to appeal. The first motion prior to appeal is filed as a new action in the court of appeals and transmitted to the circuit court, providing service on the electronic parties. Subsequent motions are also transmitted to the circuit court.

A motion to dismiss an appeal under sub. (3) does not extend the time for filing a cross-appeal. Rossmiller v. Rossmiller, 151 Wis. 2d 386, 444 N.W.2d 445 (Ct. App. 1989).

809.15 Rule (Record on appeal). (1) COMPOSITION OF RECORD. (a) The record on appeal consists of the following unless the parties stipulate to the contrary:

1. The initiating document by which the action or proceeding was commenced;
2. Proof of service of summons or other process;
3. Answer or other responsive pleading;
4. Instructions to the jury;
5. Verdict, or findings of the court, and order based thereon;
6. Opinion of the court;
7. Final judgment;
8. Order made after judgment relevant to the appeal and documents upon which the order is based;
9. Exhibits whether or not received in evidence, including photographs, video recordings, audio recordings, and computer media such as discs or flash drives, except that physical evidence, models, charts, diagrams, and photographs exceeding 8.5 x 11 inches in size shall not be included unless requested by a party to be included in the record;
10. Any other document filed in the court requested by a party to be included in the record;
11. Notice of appeal;
12. Bond or undertaking;
13. Transcript of court reporter's verbatim record;
14. Certificate of the clerk.

(b) The clerk of the circuit court may request by letter permission of the court to substitute a photocopy for the actual paper or exhibit filed in the circuit court. A photocopy does not include a document that the clerk of the circuit court has electronically scanned into the court record as permitted under SCR 72.05.

(c) For purposes of preparing the record on appeal, if the original record has been discarded as permitted under SCR 72.03 (3), the electronically scanned document constitutes the official court record.

(d) If the record includes the redacted version of any document, it shall also contain the unredacted version if submitted to the circuit court. The unredacted version shall be marked as confidential.

(e) If the record includes a sealed document, the document shall be marked as sealed.

(2) COMPILATION AND APPROVAL OF THE RECORD. The clerk of circuit court shall assemble the record in the order set forth in sub. (1) (a), identify each record item by its circuit court document number, date of filing, and title, and prepare a list of the numbered documents. The clerk shall use the document number assigned in the circuit court as the record number on appeal. The clerk shall also include in the list of numbered documents a list of exhibits not electronically maintained that are part of the record on appeal. At least 10 days before the due date for filing the record in the court, the clerk of the circuit court shall notify in writing each party appearing in the circuit court that the record has been assembled and is available for inspection. The clerk of the circuit court shall include with the notice the list of the documents constituting the record.

(3) DEFECTIVE RECORD. A party who believes that the record, including the transcript of the court reporter's verbatim record, is defective or that the record does not accurately reflect what occurred in the circuit court may move the court in which the record is located to supplement or correct the record. Motions under this subsection may be heard under s. 807.13.

(4) PROCESSING THE RECORD. (a) *Transmittal of the record*. The clerk of the circuit court shall electronically transmit the record to the court of appeals within 20 days after the date of the filing of the transcript designated in the statement on transcript or within 20 days after the date of the filing of a statement on transcript indicating that no transcript is necessary for prosecution of the appeal, unless the court extends the time for transmittal of the record or unless the tolling provisions of s. 809.14 (3) extend the time for transmittal of the record. If additional portions of the transcript are requested under s. 809.11 (5), the clerk of the

circuit court shall transmit the record to the court of appeals within 20 days after the date of the filing of the additional portions of the transcript. The clerk of the circuit court shall transmit by traditional methods any original documents or exhibits not electronically maintained.

(b) *Late transcript*. If the reporter fails to file the transcript within the time limit specified in the statement on transcript, the clerk of circuit court shall transmit the record not more than 90 days after the filing of the notice of appeal, unless the court of appeals extends the time for filing the transcript of the court reporter's verbatim record. If the court extends the time for filing the transcript of the court reporter's verbatim record, the clerk of circuit court shall transmit the record within 20 days after the date that the transcript is filed.

(c) *Supplementation or correction of record*. Notwithstanding pars. (a) and (b), if a motion to supplement or correct the record is filed in circuit court, the clerk of circuit court may not transmit the record until the motion is determined. The clerk of the circuit court shall transmit to the clerk of the court of appeals a copy of any motion to supplement or correct the record that is filed in circuit court. The circuit court shall determine, by order, the motion to supplement or correct the record within 14 days after the filing or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion and shall transmit the record to the court of appeals within 20 days after entry of the order. If the circuit court grants the motion, the clerk of circuit court shall transmit the supplemented or corrected record to the court of appeals within 20 days after entry of the order or filing of the supplemental or corrected record in the circuit court, whichever is later.

(4m) NOTICE OF FILING OF RECORD. The clerk of the court of appeals shall notify the clerk of circuit court and all parties appearing in the circuit court of the date on which the record was filed. When the clerk of the circuit court must transmit original documents or exhibits not electronically maintained by traditional methods, the date on which the record was filed is the date the electronic transmission and index was received by the clerk of the court of appeals.

(5) AGREED STATEMENT IN LIEU OF RECORD. The parties may file in the court within the time prescribed by sub. (4) an agreed statement of the case in lieu of the record on appeal. The statement must:

(a) Show how the issues presented by the appeal arose and were decided by the trial court; and

(b) Recite sufficient facts proved or sought to be proved as are essential to a resolution of the issues presented.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 104 Wis. 2d xi (1981); Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1987 a. 403; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; Sup. Ct. Order No. 12-05, 2012 WI 112, 344 Wis. 2d xxxii; Sup. Ct. Order No. 15-02, 2015 WI 102, 365 Wis. 2d xix; 2017 a. 365 s. 111; Sup. Ct. Order No. 19-01, 2019 WI 44, 386 Wis. 2d xvii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: Sub. (1) substantially embodies former s. 251.25. It also permits the filing of a photocopy instead of the original record but only with the approval of the Court of Appeals, changing to some extent prior Rules 251.25 (13) and 251.27. Under this section the parties can stipulate to exclude some items from the record, but this should be done before the clerk assembles the record.

Sub. (2). The responsibility for having the record assembled and transmitted to the Court of Appeals is transferred from the appellant to the clerk of the trial court. It is not necessary to have the attorneys present at the pagination of the record. The federal procedure set forth in Rule 11 (b), FRAP, under which the clerk assembles the record and then notifies the parties so that they can inspect the record prior to it being sent to the Court of Appeals is adopted. Also adopted is the federal procedure of the clerk preparing a list of all the papers in the record. The former system of numbering each page in the record consecutively is abandoned for the simpler practice of assigning a letter or number to each document and using its internal page reference. Thus, the reference to the third page of the first document would be A-3 and to the fifth page of the second document B-5.

Sub. (3). This provision replaces former Rule 251.30 and s. 817.117.

Subs. (4) and (5). The provisions of former Rules 251.29 and 251.28 are included in these subsections. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1981: Sub. (4) is amended to provide for an expedited transmittal of the record for appeals in which a transcript is not necessary for prosecution of the appeal or a transcript is filed in less than the maximum time period permitted by ch. 809. [Re: Order effective Jan. 1, 1982]

Judicial Council Note, 1988: Sub. (3) is amended to allow motions to correct the record to be heard by telephone conference. [Re: Order effective Jan. 1, 1988]

Judicial Council Note, 2001: Subsection (2) requires that numbers be used to identify the contents of the record. Subsection (4) (a) recreates the general rule for record transmittal from former sub. (4). Exceptions to the general rule are set forth in subs. (4) (b) and (c). Subsection (4m) recreates the last sentence of former sub. (4). [Re: Order No. 00-02 effective July 1, 2001]

NOTE: Sup. Ct. Order No. 15-02 states: The Comments to Wis. Stat. ss. 809.105 (3) and 809.15 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

Comment, 2015: Effective July 1, 2016, the Wisconsin Supreme Court amended the Rules of Appellate Procedure to permit the clerk of circuit court to transmit the record to the appellate court electronically. The amendment applies to record transmittals due on or after July 1, 2016. [Re: Order No. 15-02 effective July 1, 2016]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: In 2016 the court adopted ss. 809.19 (2) (i) and 801.21 (9) relating to redaction and sealing of certain court documents. Sub. (1) addresses transmittal to the court of appeals of a record that contains redacted or sealed documents.

In 2018 the circuit court case management software began assigning a document number to each item in the circuit court record as it is filed. Sub. (2) requires the record index to use the same numbering on appeal. This will facilitate identification of documents and minimize confusion that may arise when a document is stamped with two different numbers by the circuit and appellate courts. If a circuit court record item is not included in the record on appeal, this will appear as a numbering gap in the index to the record.

An appellant's failure to file a motion under sub. (3) did not constitute waiver of the right to challenge the adequacy of the transcript. State v. Perry, 136 Wis. 2d 92, 401 N.W.2d 748 (1987).

It is the appellant's responsibility to assure that the record is complete. If the record is incomplete, it is assumed that the missing material supports the trial court's ruling. Fiumefreddo v. McLean, 174 Wis. 2d 10, 496 N.W.2d 226 (Ct. App. 1993).

809.17 Rule (Expedited appeals program, voluntary alternative dispute resolution and presubmission conference). (1) In order to minimize appellate delay and reduce its backlog, the court of appeals may develop an expedited appeals program. The program may involve mandatory completion of docketing statements by appellant's counsel and participation in presubmission conferences at the direction of the court, but participation in the court's accelerated briefing and decision process is voluntary. The rules and procedures governing the program shall be set forth in the court of appeals' internal operating procedures.

(2) The court of appeals may require all attorneys of record in any appeal to participate in a presubmission conference, either by telephone or in person, with an officer of the court. An attorney of record with no direct briefing interest in the appeal may waive his or her participation in the conference by written notice to the court.

(2m) The court of appeals may establish an appellate mediation program and make and enforce all rules necessary for the prompt and orderly dispatch of the business of the program. Participation in the appellate mediation program is voluntary, but the program may involve mandatory participation in the presubmission conferences at the direction of the court. Only those cases in which a docketing statement is required to be filed under s. 809.10 (1) (a) are eligible for participation in the appellate mediation program. The parties to the appeal shall pay the fees of a mediator providing services under the program, unless those fees are waived or deferred by the court. The rules and procedures governing the program shall be set forth in the court of appeals' internal operating procedures.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 131 Wis. 2d xvi (1986); Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii.

Court of Appeals Note, 1986: Section (Rule) 809.17 is repealed and recreated to give the court of appeals authority to administer its expedited appeals program pursuant to Section VII, Expedited Appeals, of the Court of Appeals Internal Operating Procedures (amended 1986). The rule replaces a similar delegation of authority to the chief judge of the court of appeals by order of the supreme court dated December 19, 1983. [Re Order effective January 1, 1987]

809.18 Rule (Voluntary dismissal). (1) An appellant may dismiss a filed appeal by filing a notice of dismissal in the court or, if the appeal is not yet filed, in the circuit court. The dismissal of an appeal by the appellant or by agreement of the parties or their counsel does not affect the status of a lower court decision, the status of a cross-appeal, or the right of a respondent to file a cross-appeal.

(2) If the parties compromise or otherwise settle the entire matter in litigation prior to the issuance of the decision of the court of appeals, the appellant shall immediately inform the court in writing, signed by all parties, that the matter has been compromised or settled. Upon receipt of such information, the court shall dismiss the appeal in accordance with sub. (1).

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1995 a. 224; Sup. Ct. Order No. 01-15, 2003 WI 94, 261 Wis. 2d xxxvii; Sup. Ct. Order No. 07-15, 2008 WI 27, filed 4-2-08, eff. 7-1-08.

Judicial Council Committee's Note, 1978: An appeal may be dismissed by the appellant at any time prior to a court decision on the appeal without approval of the court or the respondent. This changes the former procedure and modifies Rule 42, FRAP. The Rule specifically protects a respondent who has or intends to file a cross-appeal, and for this reason the appellant is authorized to dismiss the appeal at will. The filing of a notice of dismissal does not affect the liability of the appellant for costs or fees, or the power of the court to impose penalties under Rule 809.83 (1). [Re Order effective July 1, 1978]

This section does not require the dismissal of a petition for a supervisory writ upon the filing of a notice of voluntary dismissal. A petition for a supervisory writ is not an "appeal." Interest of Peter B. 184 Wis. 2d 57, 616 N.W.2d 746 (Ct. App. 1994).

The court of appeals must dismiss an appeal when an appellant files a notice of voluntary dismissal before the court issues its decision on the appeal. State v. Lee, 197 Wis. 2d 960, 542 N.W.2d 143 (1996).

The date stamped on a court of appeals decision or order is the date it is issued and filed. That the clerk's office mails appellate decisions to the parties the day before they are dated and filed does not mean that decisions are to be deemed to have been issued on the mailing date. A notice of voluntary dismissal filed on the day prior to an opinion being issued operates to automatically dismiss the appeal. State v. Jones, 2002 WI 53, 252 Wis. 2d 592, 645 N.W.2d 610, 01-1155.

809.19 Rule (Briefs and appendix). (1) BRIEF OF APPELLANT. The appellant shall file a brief within 40 days of the filing in the court of the record on appeal. The brief must contain:

(a) A table of contents with page references of the various portions of the brief, including headings of each section of the argument, and a table of cases arranged alphabetically, statutes and other authorities cited with reference to the pages of the brief on which they are cited.

(b) A statement of the issues presented for review and how the trial court decided them.

(c) A statement with reasons as to whether oral argument is necessary and a statement as to whether the opinion should be published and, if so, the reasons therefor.

(d) A statement of the case, which must include: a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record.

(e) An argument, arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.

(f) A short conclusion stating the precise relief sought.

(g) Reference to an individual by one or more initials or other appropriate pseudonym or designation rather than by his or her full name when the record is required by law to be confidential or as required under s. 809.86. In an appeal from a domestic abuse protective order or harassment injunction in which "petitioner" has been substituted for an individual's name in the caption, reference to that individual shall be made only as "petitioner."

(h) The signature of the attorney who files the brief; or, if the party who files the brief is not represented by an attorney, the signature of that party. If the brief was prepared with the drafting assistance of an attorney under s. 802.05 (2m), the brief must contain a statement that "This document was prepared with the assistance of a lawyer."

(i) Reference to the parties by name, rather than by party designation, throughout the argument section, unless "petitioner" must be substituted for the party's name under par. (g).

(2) APPENDIX. (a) *Contents*. The appellant's brief shall be filed with a short appendix containing, at a minimum, the findings or opinion of the circuit court, limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues, and a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b). If the appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix shall also contain the findings of fact and conclusions of law, if any, and final decision of the administrative agency. The appendix shall include a table of contents indicating, for each record item included in the appendix, the title, page of the appendix on which the record item begins, and the circuit court document number. The table of contents shall also contain the citation of any unpublished opinion included in the appendix.

(ae) *Form*. The appendix shall be filed as a single document separate from the brief. Each document shall be imaged at a resolution sufficient to ensure legibility.

(am) *Confidentiality*. If the record is required by law to be confidential, the portions of the record included in the appendix shall be reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

(3) RESPONDENT'S BRIEF. (a) 1. The respondent shall file a brief within the later of any of the following:

a. Thirty days after the date of service of the appellant's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail.

b. Thirty days after the date on which the appellant's brief is filed.

c. Thirty days after the date on which the record is filed in the office of the clerk.

2. The brief must conform with sub. (1), except that the statement of issues and the statement of the case may be excluded.

3. Within the time limits for filing a respondent's brief, a party who has been designated as a respondent may file a statement with the court that it will not be filing a brief because its interests are not affected by the issues raised in the appellant's brief or because its interests are adequately represented in another respondent's brief.

(b) The respondent may file with the respondent's brief a supplemental appendix as a separate document. If the record is required by law to be confidential, the supplemental appendix must comply with the confidentiality requirements under sub. (2) (am). Any supplemental appendix shall include a table of contents that conforms with sub. (2) (a) and a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b). Each document to be included in the appendix shall be imaged at a resolution sufficient to ensure legibility.

(4) REPLY BRIEF. (a) The appellant shall file a reply brief, or a statement that a reply brief will not be filed, within the later of:

1. Fifteen days after the date of service of the respondent's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail; or

2. Fifteen days after the date on which the respondent's brief is filed.

(b) The reply brief under par. (a) shall comply with sub. (1) (e) and (f). If an unpublished opinion is cited under s. 809.23 (3) (a) or (b), a copy of the opinion shall be provided in an appendix to the reply brief.

(5) CONSOLIDATED, JOINT, AND MULTIPLE PARTY APPEALS. (a) Each appellant in consolidated appeals or a joint appeal and each co-appellant may file a separate brief or a joint brief with another appellant or co-appellant. Appellants and co-appellants represented by the same counsel shall file a joint brief. A joint brief must not exceed the page allowance for a single appellant.

(b) In appeals involving more than one respondent, including consolidated cases, each respondent may file a separate brief or a joint brief with another respondent. Respondents represented by the same counsel shall file a joint brief. A joint brief must not exceed the page allowance for a single respondent.

(c) When multiple appellants' briefs have been filed, only a single respondent's brief is allowed by each respondent or by respondents filing a joint brief. When multiple respondents' briefs have been filed, only a single reply brief is allowed by an appellant or co-appellant or by appellants and co-appellants who filed a joint brief.

(d) If separate briefs are filed by multiple appellants or co-appellants, the time for filing and serving the respondent's brief shall not commence until all briefs on behalf of all appellants and co-appellants have been filed. If separate briefs are filed by multiple respondents, the time for filing and serving the reply brief shall not commence until all briefs on behalf of all respondents have been filed.

(6) CROSS-APPEAL. Briefing in a cross-appeal shall be as follows:

(a) An appellant-cross-respondent shall file a brief titled "Appellant's Brief" within the time specified by, and in compliance with, the requirements of subs. (1) and (2).

(b) 1. A respondent-cross-appellant shall file a brief titled "Combined Brief of Respondent and Cross-Appellant" within the later of any of the following:

a. Thirty days after the date of service of the appellant-cross-respondent's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail.

b. Thirty days after the date on which the appellant-cross-respondent's brief is filed.

c. Thirty days after the date on which the record is filed in the office of the clerk.

2. The respondent portion of the combined brief shall comply with the requirements of this section for a respondent's brief, including the length limitation for such a brief set forth in sub. (8) (c) 1. The cross-appellant portion of the combined brief shall comply with the requirements of subs. (1) and (2) for an appellant's main brief, including the length limitation for such a brief set forth in sub. (8) (c) 1., except that the requirements of sub. (1) (c) and (d) may be

omitted, the cross-appellant portion of the combined brief shall be preceded by a white cover page titled "Cross-Appellant's Brief," and a signature shall be required only at the conclusion of the cross-appellant portion of the combined brief.

(c) 1. An appellant-cross-respondent shall file a brief titled "Combined Brief of Appellant and Cross-Respondent" within the later of:

a. Thirty days after the date of service of the respondent-cross-appellant's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail; or

b. Thirty days after the date on which the respondent-cross-appellant's brief is filed.

2. The appellant portion of the combined brief shall comply with the requirements of sub. (4) for a reply brief, including the length limitation for such a brief set forth in sub. (8) (c) 2. The cross-respondent portion of the combined brief shall comply with the requirements of sub. (3) for a respondent's brief, including the length limitation for such a brief set forth in sub. (8) (c) 1., except that the requirement of sub. (1) (c) may be omitted, the cross-respondent portion of the combined brief shall be preceded by a white cover page titled "Cross-Respondent's Brief," and a signature shall be required only at the conclusion of the cross-respondent portion of the combined brief.

(d) A respondent-cross-appellant shall file either a reply brief titled "Reply Brief of Cross-Appellant" in the form required by sub. (4) for reply briefs, or a statement that a reply brief will not be filed, within the later of:

1. Fifteen days after the date of service of the appellant-cross-respondent's brief, and 3 additional days under s. 801.15 (5) (a) if service is accomplished by mail; or

2. Fifteen days after the date on which the appellant-cross-respondent's brief is filed.

(e) Each part of a combined brief shall comply with the form and length certification requirements of sub. (8g).

(f) A respondent-cross-appellant must comply with the same appendix rules as an appellant under subs. (2) (a) and (am) and (8g), except that a respondent-cross-appellant shall not be required to include materials that are contained in the appellant's appendix.

(g) Subsection (5) applies to appeals involving multiple appellants-cross respondents or respondents-cross appellants.

(6m) GUARDIAN AD LITEM BRIEF. If the guardian ad litem chooses to participate in an appeal and takes the position of an appellant, the guardian ad litem's brief shall be filed within 40 days after the filing in the court of the record on appeal. If the guardian ad litem chooses to participate in an appeal and takes the position of a respondent, the guardian ad litem's brief shall be filed within 30 days after service of the appellant's brief. In an appeal related to the termination of parental rights, a guardian ad litem shall follow the filing procedures set forth under s. 809.107 (6) (d). If an unpublished opinion is cited under s. 809.23 (3) (a) or (b), a copy of the opinion shall be provided in an appendix to the brief. If the guardian ad litem chooses not to participate in an appeal of an action or proceeding, the guardian ad litem shall file with the court a statement of reasons for not participating within 20 days after the filing of the appellant's brief. The time for filing and serving the brief due after the guardian ad litem's brief shall not commence until all briefs of the parties in the position taken by the guardian ad litem have been filed.

(7) NONPARTY BRIEFS. (a) A person not a party may by motion request permission to file a brief. The motion shall identify the interest of the person and state why a brief filed by that person is desirable.

(b) If the brief will support or oppose a petition under s. 809.62 or 809.70, the brief shall accompany the motion and shall be filed within the time permitted for the opposing party to file a response to the petition. If an unpublished opinion is cited under s. 809.23 (3) (a) or (b), a copy of the opinion shall be provided in an appendix to the brief.

(c) Except as provided in par. (b), the motion shall be filed not later than 14 days after the respondent's brief is filed, and the brief shall be filed within the time specified by the court. If an unpublished opinion is cited under s. 809.23 (3) (a) or (b), a copy of the opinion shall be provided in an appendix to the brief.

(d) A nonparty brief shall comply with sub. (1) (e) and (f).

(8) NUMBER, FORM, PAGINATION, AND LENGTH OF BRIEFS AND APPENDICES. (a) *Number*. 1. For electronic filing users, each brief or appendix shall be filed and served using the electronic filing system as provided in s. 809.801 (6) (a). The filing party shall serve one copy of the brief and appendix on each paper party by traditional methods.

2. A paper party shall file, serve, and receive paper documents by traditional methods as provided in s. 809.80. A paper party shall file one copy of each brief or appendix with the court and serve one copy on every other paper party by traditional methods.

(b) *Form*. A brief or appendix must conform to the following specifications:

1. Created by a process that produces a clear, black image on a white background. Cover pages shall be white. Carbon copies may not be filed.

2. Formatted to fit on 8.5 by 11 inch paper.

3. a. The use of word processors or typewriters is encouraged but not required.

b. If a monospaced font is used: 10 characters per inch; double-spaced.

c. If a proportional serif font is used: minimum 13 point body text, 11 point for block quotes and footnotes. Italics may be used only for citations, headings, emphasis and foreign words; bold may be used only for citations, headings, and emphasis. Line spacing in body text must be between 1.15 and 1.5 lines or an equivalent line spacing; additional space between paragraphs is permitted but not required. Block quotes and footnotes must be single-spaced.

d. If handwriting is used: the text must be legibly printed and not include cursive writing, except the person's signature.

e. Margins must be a minimum of a 1.25-inch margin on the right and left sides and a minimum of a 1-inch margin on the top and bottom.

4. The pages of paper documents must be secured together at the top left corner.

(bm) *Pagination*. A brief or appendix must have page numbers centered in the bottom margin using Arabic numerals with sequential numbering starting at "1" on the cover.

(c) *Length*. 1. For a brief filed by a party under sub. (1), (5), or (6) (a), (b), or (c), or by a guardian ad litem under sub. (6m), those portions of the brief referred to in sub. (1) (d), (e) and (f) shall not exceed 50 pages if a monospaced font or handwriting is used, or 11,000 words if a proportional serif font is used.

2. For a reply brief filed under sub. (4) or (6) (d), those portions referred to in sub. (1) (e) and (f) shall not exceed 13 pages if a monospaced font or handwriting is used, or 3,000 words if a proportional serif font is used.

3. For a brief filed under sub. (7), those portions of the brief referred to in sub. (1) (e) and (f) shall not exceed 13 pages if a monospaced font or handwriting is used, or 3,000 words if a proportional serif font is used.

(8g) CERTIFICATIONS. (a) *Briefs; certification regarding form and length*. 1. Counsel shall submit with the brief a signed certification that the brief meets the form and length requirements of sub. (8) (b), (bm), and (c) in the following form:

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is .... [pages] [words].

Signed: ....

Signature

2. For purposes of the certification of length under this paragraph, counsel filing a brief may use the word count produced by a commercial word processor available to the general public. The word count shall include the words of any text included in the brief in the form of an image.

(b) *Appendices; certification regarding contents and confidentiality*. 1. An appellant's counsel shall submit with the appendix a signed certification that the appendix meets the content and confidentiality requirements of sub. (2) (a) and (am) in the following form:

CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed: ....

Signature

2. Counsel filing a supplemental appendix shall submit it with a signed certification that the appendix complies with the confidentiality requirements under sub. (2) (am) in a form substantially similar to the confidentiality provision under subd. 1

(c) *Combined certifications*. Certification of a brief under par. (a) and certification of an appendix or supplemental appendix under par. (b) may be combined in a single document for signature.

(d) *Electronic signature*. For electronic filing users, a certification may be electronically signed in accordance with s. 809.801 (12) (a).

(9) BRIEF COVERS. Each brief or appendix shall have a white front cover. The front cover shall contain the name of the court, the caption and number of the case, the court and judge appealed from, the title of the document, and the name and address of counsel filing the document. Except as provided in s. 809.81 (8) and (9), the caption shall include the full name of each party in the circuit court and shall designate each party so as to identify each party's status in the circuit court and in the appellate court, if any. In the supreme court, "petitioner" shall be added to the party designation of the petitioner, and the respondent's party designation shall remain the same as in the court of appeals.

(10) CITATION OF SUPPLEMENTAL AUTHORITIES. If pertinent authorities decided after briefing come to the attention of a party or a nonparty under sub. (7) or a guardian ad litem under sub. (6m) after the party's or nonparty's or guardian ad litem's brief has been filed, or after oral argument but before decision, the party, nonparty, or guardian ad litem may promptly advise the clerk of the court, by letter, and serve a copy of that letter on all parties to the appeal. If the new authority is a decision of the Wisconsin court of appeals, the authority is considered decided for purposes of this subsection on the date of an order for publication issued under s. 809.23 (2). The letter shall do the following:

(a) Set forth the citations for the authority.

(b) Identify the page of the brief or the point that was argued orally to which the citations pertain.

(c) For each authority that is cited, briefly discuss the proposition that the authority supports.

(11) RESPONSE TO SUPPLEMENTAL AUTHORITIES. A response to the letter under sub. (10) may be filed within 11 days after service of that letter. The response shall briefly discuss the reason why each authority does not support the stated proposition, unless the proposition is not disputed.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); 1979 c. 110; Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 390 s. 252; Sup. Ct. Order, 111 Wis. 2d xiii (1983); Sup. Ct. Order, 112 Wis. 2d xv (1983); Sup. Ct. Order, 115 Wis. 2d xv (1983); Sup. Ct. Order, 123 Wis. 2d xx (1985); Sup. Ct. Order, 146 Wis. 2d xxxiii (1988); Sup. Ct. Order, 151 Wis. 2d xvii (1989); Sup. Ct. Order, 161 Wis. 2d xiii (1991); Sup. Ct. Order, 164 Wis. 2d xxix (1991); Sup. Ct. Order, 167 Wis. 2d xiii (1992); Sup. Ct. Order, 171 Wis. 2d xiii, xvii, xxxvii (1992); Sup. Ct. Order No. 93-20, 179 Wis. 2d xxv (1993); 1993 a. 486; 1995 a. 224; Sup. Ct. Order No. 97-01, 208 Wis. 2d xxiii (1997); 1997 a. 35; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; Sup. Ct. Order No. 04-11, 2005 WI 149, 283 Wis. 2d xix; Sup. Ct. Order No. 06-02, 2006 WI 118, 291 Wis. 2d xiii; Sup. Ct. Order No. 07-03, 2007 WI 129, 303 Wis. 2d xxvii; Sup. Ct. Order No. 08-15 and Sup. Ct. Order No. 08-18, 2009 WI 4, 311 Wis. 2d xxix; 2009 a. 180; Sup. Ct. Order No. 10-01 and Sup. Ct. Order No. 10-02, 2010 WI 42, 323 Wis. 2d xxiii; Sup. Ct. Order No. 13-10, 2014 WI 45, 354 Wis. 2d xliii; Sup. Ct. Order No. 14-01, 2015 WI 21, filed 3-2-15, eff. 7-1-15; Sup. Ct. Order No. 17-05, 2017 WI 95, filed 11-9-17, eff. 7-1-18; 2017 a. 364 s. 49; 2017 a. 365; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21; 2021 a. 240 s. 30.

Judicial Council Committee's Note, 1978: Sub. (1). The format for briefs established in former Rule 251.34 is generally followed except that the requirement of a synopsis of the argument in the table of contents is eliminated. Former Rule 251.34 (1) required the synopsis and gave 200 Wis. 530 as an illustration. The synopsis was no longer included in most briefs and if it was, often was very lengthy and served no real purpose. It is replaced in the table of contents by a shorter, one sentence summary of each section of the argument portion of the brief. New statements pertaining to the need for oral argument and whether the opinion in the case will set precedent and thus should be published are added. The purpose of the latter is to assist the court in screening cases for oral argument or submission on briefs.

Sub. (2). The lengthy appendix with the narrative of testimony required by former Rule 251.34 (5) is replaced with the system used in the United States Court of Appeals for the Seventh Circuit. Under this system the original record serves as the primary evidence of what occurred in the trial court. The appendix becomes a very abbreviated document with only those items absolutely essential to an understanding of the case. It is designed to be nothing more than a useful tool to the members of the court. The failure to include some item in the appendix has no effect on the ability or willingness of the court to consider any matter in the record. This change, combined with the elimination of the requirement of printed briefs, should reduce the cost of an appeal.

Sub. (5). Each appellant in a case has the right to file a separate brief and need not share a brief with co-appellants.

Sub. (6). The parties to a cross-appeal can file the same briefs as the parties to the main appeal. Thus the cross-appellant can file a 40 page brief as cross-appellant in addition to his 40 page brief as respondent. The cross-appellant can also combine both briefs in a single brief but is limited to the page limits on each section of brief. A cross-appellant filing a 30 page brief as respondent is still limited to a 40 page brief as cross-appellant.

Sub. (7). The practice under former Rule 251.40 is modified to require the request to file an amicus curiae brief be made by motion rather than by letter. Rule 29, FRAP. The motion should indicate the interest of the amicus and why a brief by the amicus is desirable.

Subs. (8) and (9). In addition to briefs produced by the standard typographical process, briefs produced by a mimeograph or photocopy process from typewritten copy may also be filed. The principal objective is to reduce the cost of an appeal to the Court of Appeals. The specifications for the printed and typewritten pages are designed to result in briefs of approximately an equal number of words no matter which process is used. The paper size of 8-1/2 x 11 is specified for the sake of uniformity and ease of handling.

Colors for covers are specified to permit easy identification of the briefs. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (8) (a) previously required that 30 copies of a brief or appendix be filed in either the Court of Appeals or Supreme Court. The number of copies to be filed in the Court of Appeals or Supreme Court has been reduced to 20 copies to reflect the smaller number of judges deciding an appeal before the Court of Appeals and the difficulty the Supreme Court is facing in having enough storage space to retain the 30 copies of a brief previously required. The provision in Rule 809.43 requiring the filing of 10 copies of a brief and appendix in an appeal heard by one judge remains unchanged. [Re Order effective Jan. 1, 1980]

Judicial Council Committee's Note, 1981: Sub. (1) (e) is amended to incorporate SCR 80.02, governing citation of a published court of appeals or supreme court opinion in a brief, memorandum or other document filed with the court of appeals or supreme court.

Sub. (8) (b) 4 previously required that a brief and appendix be bound only on the left side with staple or tape. A sufficient number of heavy strength staples are to be used to assure that the briefs and appendix remain securely bound when used by the court of appeals and supreme court. The prior alternative method of binding the brief and appendix solely with tape is repealed.

Sub. (9) is amended to clarify that both a front and back cover of a brief and appendix are required. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 1988: Sub. (7) (b) permits nonparties to request permission to file a brief supporting or opposing a petition for the Supreme Court to review a decision of the Court of Appeals or to take original jurisdiction. In these cases, the motion and the brief shall be filed together, within the time permitted for response by the opposing party.

Revised sub. (8) (c) clarifies that the page limit does not include the table of contents, table of cases and other authorities, statement of issues, statement on oral argument and publication, appendix or supplemental appendix. [Re Order effective Jan. 1, 1989]

Judicial Council Note, 2001: Subsection (1) (h) requires a signature on briefs. Subsection (1) (i) makes identification of the parties consistent and less confusing. Subsection (3) was revised to address a situation in which the appellant's brief is served on the respondent, but has not yet been accepted for filing by the court. If the respondent undertakes to prepare its brief within 30 days after service of the appellant's brief and the appellant's brief has not yet been accepted for filing, the respondent will have wasted time and energy if the appellant's brief ultimately is rejected. The last sentence of sub. (4) was added to require record references and a conclusion in a reply brief. Subsection (6) was rewritten to clarify briefing requirements in cross-appeals. The time limit in sub. (7) (c) was changed from 10 to 14 days. Please see the comment to s. 808.07 (6) concerning time limits. The reference to s. 809.43 was deleted in sub. (8) (a) 1. because the greater number of copies is needed when a single-judge appeal reaches the supreme court. Subsection (8) (a) 3. was amended to apply to *pro se* parties only. Subsection (8) (b) 4. was amended to allow "velobinding" of briefs, a process commonly accepted but not authorized by statute. Subsection (9) requires parties to use the complete case caption. Parties shall not abridge the caption by use of "et al" or similar phrases. Subsections (10) and (11) are new and establish a procedure for supplementing briefs or oral argument with pertinent authorities that subsequently come to the attention of a party or an amicus curiae, who is denoted a "nonparty" under sub. (7), or a guardian ad litem under sub. (8m). This procedure is based upon Federal Rule of Appellate Procedure 28 (j) and Circuit Rule 28 (e) of the Seventh Circuit Court of Appeals. [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: Occasionally an appellant's brief is filed before the record is filed with the appellate court clerk, especially in cases involving pro se appellants. The amendments to subs. (3) and (6) (b) 1. conform to current practice by establishing the due date for the respondent's brief or respondent-cross-appellant's brief as the latest of thirty days after date of service of the appellant's brief (plus three days if service is by mail), thirty days after the date on which the court accepts the appellant's brief or appellant-cross-respondent's brief for filing, or thirty days after the date on which the record is filed in the office of the clerk.

Subsection (9) is amended to conform to the party designations used by the clerk's office when a petition for review is granted. [Re Order No. 02-01 effective January 1, 2003]

Comment, October 2005: As the number of appeals has increased, the Court of Appeals' reliance on appendices during the decision-making process has increased. The Court of Appeals requests that Wis. Stat. § (Rule) 809.19 (2) (b) be created to require that appellant's counsel certify compliance with Wis. Stat. § (Rule) 809.19 (2) (a) (as renumbered by this order), that requires an appellant's brief include an appendix and sets forth the contents of the appendix. The Court of Appeals believes that a certification requirement, similar to the form and length certification required by Wis. Stat. § (Rule) 809.19 (8) (d) will result in increased compliance with renumbered Wis. Stat. § (Rule) 809.19 (2) (a) and improve the quality of appendices that are filed with the court. [Re Sup. Ct. Order No. 04-11]

NOTE: Sup. Ct. Order No. 08-15 and 08-18, 2009 WI 4, states: "The following Comment to Wis. Stat. §§ (Rule) 809.19 (12) and 809.19 (13) is not adopted but will be published and may be consulted for guidance in interpreting and applying the statute."

Comment, 2008: An electronic brief required under s. 809.19 (12) and an electronic appendix requested under s. 809.19 (13) are in addition to and not a replacement for the paper brief and appendix required under s. 809.19. The filing requirement is satisfied only when the requisite number of paper copies of the brief and appendix and the electronic brief are filed.

The filing of an electronic appendix is encouraged, but not required. These rules do not provide for total electronic filing at the appellate level. Accordingly, the paper copies of appellate briefs and appendices constitute the official court record.

An electronic brief shall be submitted to the court as a text-searchable Portable Document Format (PDF) document. "PDF" is a universal file format that preserves the fonts, formatting, pagination, and graphics of a source document. A text-searchable brief is created by electronically converting the original word processing file to a PDF document. An electronic appendix may be submitted as a non-text-searchable PDF document. A non-text-searchable appendix is created by scanning the paper document to create a PDF document.

Electronic briefs may be enhanced with internal links (such as a table of contents with links to locations in the brief) or external links (links to websites containing the text of cases or statutes cited in the brief). External links in an electronic brief shall not require a password for access to the case or statute. No enhancement to an electronic brief shall alter the text of the brief.

All electronic briefs shall be submitted in a single electronic file. The file containing the electronic brief ***shall not*** contain the appendix or any other document or material. An electronic appendix containing more than 200 pages may be split into smaller electronic files.

Sample electronic brief certification form:

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed …..

Signature

Sample electronic appendix certification form:

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19 (13). I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Signed …..

Signature

[Re Order No. 08-15 and 08-18 effective July 1, 2009]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Sub. (1) (g) addresses cases in which an individual seeks a restraining order or harassment injunction as protection against domestic abuse or violence. 18 U.S.C. 2265 (d) prohibits making public on the Internet any information that would reveal the identity or location of the party seeking protection. In Wisconsin, parties should designate the party seeking protection solely as "petitioner" in the case caption and the briefs. Adding this requirement to the rule is consistent with current practice and federal requirements. It is an exception to par. (i), which otherwise requires reference to the parties by name and not by party designation. A similar change is made to s. 809.81 (9) regarding the caption.

Since late 2018, the circuit court case management software has been assigning a document number to each item in the circuit court record as it is filed. Sub. (2) (a) provides that the same number will be used in the record index for the appeal. This will make it easier for parties to refer to documents and will prevent confusion from stamping a document with two different numbers.

Sub. (2) (ae) requires the appendix to be filed as a single document. In the event of a very large appendix that cannot be electronically filed as a single document due to the size limitations of the system, s. 809.801 (8) directs the user to contact the clerk of court for assistance.

Sub. (3) (a) provides that the events used for calculation of the time for a response brief are filing of the brief, service of the brief, and filing of the record. When the clerk accepts a filed document, the clerk's entry of the new document into the court record will trigger a notice of activity to the electronic parties, thereby serving them. Thus, for electronic parties the filing and service of the brief will often be the same day. For briefs submitted after the business hours of the clerk's office, the clerk will enter the document into the court record the next business day, so the filing date will be different than the date of electronic service. The calculation of time for parties served by paper remains as provided in s. 809.8 (4) (b) and 801.14 (2).

Sub. (8) (a) provides that electronic filing users no longer need to file multiple paper copies of briefs with the court. A notice of activity to users is generated when the clerk enters the brief into the court record, allowing the other electronic parties to access the brief electronically. Paper parties file one paper copy of each brief and appendix with the court, which the clerk will scan and make part of the record.

Sub. (8) (b) makes a number of changes to form, while maintaining the overall appearance of the documents. Standards for handwritten briefs have been added, along with a statement of the court's authority to review briefs for legibility. Margins are required so that scanned documents will include all the words.

Sub. (8) (bm) requires pagination using Arabic numerals beginning on the first page of each document. This will match the page number to the page header applied by the eFiling system, avoiding the confusion of having two different page numbers.

Sub. (8) (c) is reorganized to clarify allowable page counts and word limits for the various kinds of briefs. Page limits specific to handwritten briefs have been added, based on the average number of words per page found in handwritten briefs currently on file.

Sub. (8g) addresses certification of the brief, appendix, and supplemental appendix in a single section. The language of the certifications for brief and appendix is largely unchanged. Certifications may be combined into a single document for signature. Electronic filing users may certify using their electronic signatures.

Appellate counsel's appendix containing only a copy of the judgment of conviction, a notice of motion and motion to suppress, and a notice of intent to pursue postconviction relief did not meet the standard under sub. (2) (a) to contain "essential to an understanding of the issues raised." When counsel certified that the essential items were in the appendix when they were not, the certification was false and counsel was subject to sanction. State v. Bons, 2007 WI App 124, 301 Wis. 2d 227, 731 N.W.2d 367, 06-1625.

When the court of appeals is considering imposing a sanction on an attorney for filing a brief with a deficient appendix, an order to show cause should be issued directing counsel to explain why a violation of sub. (2) (a) and (b) should not be found and why the attorney should not pay a monetary penalty for failing to include in the appendix portions of the record that may have been essential to an understanding of the issue in the case and for filing a false certification. The order to show cause should state that alternatively, the attorney may pay the amount of money stated in the order within 30 days of the date of the order without showing cause why the attorney should not be relieved of this obligation. State v. Nielsen, 2011 WI 94, 337 Wis. 2d 302, 805 N.W.2d 353, 10-0387.

The page length limits in sub. (8) apply in original jurisdiction actions. Watts v. Thompson, 116 F.3d 220 (1997).

809.20 Rule (Assignment and advancement of cases). The court may take cases under submission in such order and upon such notice as it determines. A party may file a motion to advance the submission of a case either before or after the briefs have been filed. The motion should recite the nature of the public or private interest involved, the issues in the case and how delay in submission will be prejudicial to the accomplishment of justice.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978).

Judicial Council Committee's Note, 1978: This rule incorporates the present unwritten procedure for having the submission of a case advanced. It also specifies the factors that may affect the advancement of a case. [Re Order effective July 1, 1978]

809.21 Rule (Summary disposition). (1) The court upon its own motion or upon the motion of a party may dispose of an appeal summarily.

(2) A party may file at any time a motion for summary disposition of an appeal. Section 809.14 governs the procedure on the motion.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1981 c. 390 s. 252.

Judicial Council Committee's Note, 1978: The basic concept in former Rule 251.54 of allowing the Supreme Court to dispose of appeals summarily is continued, but Rule 809.21 specifically authorizes a motion for this purpose. Such a motion was often used under prior procedure, but the rules did not expressly authorize it. [Re Order effective July 1, 1978]

809.22 Rule (Oral argument). (1) The court shall determine whether a case is to be submitted with oral argument or on briefs only.

(2) The court may direct that an appeal be submitted on briefs only if:

(a) The arguments of the appellant:

1. Are plainly contrary to relevant legal authority that appear to be sound and are not significantly challenged;
2. Are on their face without merit and for which no supporting authority is cited or discovered; or
3. Involve solely questions of fact and the fact findings are clearly supported by sufficient evidence; or

(b) The briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant.

(3) The court shall determine the amount of time for oral argument allowed to each party in a case either by general or special order.

(4) On motion of any party or its own motion, the court may order that oral argument be heard by telephone.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 141 Wis. 2d xiii (1987).

Judicial Council Committee's Note, 1978: The Supreme Court has for a number of years scheduled some cases for submission on briefs only without oral argument in an effort to accommodate its burgeoning caseload. The criteria by which the court decides whether a case is to have oral argument have never been formally adopted. This rule is a statement of those criteria. Counsel should address these criteria in their briefs in discussing the question of the need for oral argument. See Rule 809.19 (1) (c). Flexibility is provided by sub. (3) as to the length of oral argument in order to meet the needs of an individual case. It may be appropriate, for example, to have an oral argument for the sole purpose of allowing the court to ask questions of counsel. [Re Order effective July 1, 1978]

Judicial Council Note, 1988: Sub. (4) [created] authorizes oral arguments to be heard by telephone conference on motion of any party or the court of appeals. [Re Order effective Jan. 1, 1988]

809.23 Rule (Publication of opinions). (1) CRITERIA FOR PUBLICATION. (a) While neither controlling nor fully measuring the court's discretion, criteria for publication in the official reports of an opinion of the court include whether the opinion:

1. Enunciates a new rule of law or modifies, clarifies or criticizes an existing rule;
2. Applies an established rule of law to a factual situation significantly different from that in published opinions;
3. Resolves or identifies a conflict between prior decisions;
4. Contributes to the legal literature by collecting case law or reciting legislative history; or
5. Decides a case of substantial and continuing public interest.

(b) An opinion should not be published when:

1. The issues involve no more than the application of well-settled rules of law to a recurring fact situation;
2. The issue asserted is whether the evidence is sufficient to support the judgment and the briefs show the evidence is sufficient;
3. The issues are decided on the basis of controlling precedent and no reason appears for questioning or qualifying the precedent;
4. The decision is by one court of appeals judge under s. 752.31 (2) and (3);
5. It is a per curiam opinion on issues other than appellate jurisdiction or procedure;
6. It has no significant value as precedent.

(2) DECISION ON PUBLICATION. The judges of the court of appeals who join in an opinion in an appeal or other proceeding shall make a recommendation on whether the opinion should be published. A committee composed of the chief judge or a judge of the court of appeals designated by the chief judge and one judge from each district of the court of appeals selected by the court of appeals judges of each district shall determine whether an opinion is to be published.

(3) CITATION OF UNPUBLISHED OPINIONS. (a) An unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b).

(b) In addition to the purposes specified in par. (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31 (2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

(c) A party citing an unpublished opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

(4) REQUEST FOR PUBLICATION. (a) Except as provided in par. (b), any person may at any time file a request that an opinion not recommended for publication or an unreported opinion be published in the official reports.

(b) No request may be made for the publication of an opinion that is a decision by one court of appeals judge under s. 752.31 (2) and (3) or that is a per curiam opinion on issues other than appellate jurisdiction or procedure.

(c) A person may request that a per curiam opinion that does not address issues of appellate jurisdiction or procedure be withdrawn, authored and recommended for publication. That request shall be filed within 20 days of the date of the opinion and shall be decided by the panel that decided the appeal.

(d) A copy of any request made under this subsection shall be served on the parties to the appeal or other proceeding in which the opinion was filed. A party to the appeal or proceeding may file a response to the request within 5 days after the request is filed.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii; 1981 c. 390 s. 252; Sup. Ct. Order, 109 Wis. 2d xiii (1982); Sup. Ct. Order, 118 Wis. 2d xiii (1984); 1991 a. 189, Sup. Ct. Order No. 96-10, 208 Wis. 2d xiii (1997), Sup. Ct. Order No. 01-04, 2001 WI 135, 248 Wis. 2d xvii; Sup. Ct. Order No. 08-02, 2009 WI 2, 311 Wis. 2d xxv; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: As with Rule 809.22 on oral argument, a former practice of the Supreme Court is written into this Rule and formal criteria established for it. The trend toward nonpublication of opinions is nationwide and results from the explosion of appellate court opinions being written and published. Many studies of the problem have concluded that unless the number of opinions published each year is reduced legal research will become inordinately time-consuming and expensive. Some argue that even accepting the premise that a court may properly decide not to publish an opinion this should not prevent that opinion from being cited as precedent since in common law practice any decision of a court is by its nature precedent. Others argue that a court may try to hide what it is doing in a particular case by preventing the publication of the opinion in the case.

There are several reasons why an unpublished opinion should not be cited: (1) The type of opinion written for the benefit of the parties is different from an opinion written for publication and often should not be published without substantial revision; (2) If unpublished opinions could be cited, services that publish only unpublished opinions would soon develop forcing the treatment of unpublished opinions in the same manner as published opinions thereby defeating the purpose of nonpublication; (3) Permitting the citation of unpublished opinions gives an advantage to a person who knows about the case over one who does not; (4) An unpublished opinion is not new authority but only a repeated application of a settled rule of law for which there is ample published authority.

If it is desirable to reduce the number of published opinions, the only alternative to having some opinions unpublished is to decide cases without written opinions. This would be far worse because it would compound the problems of nonpublication and at the same time take away from the parties the benefit of a written opinion.

Section 752.41 (3) authorizes the Supreme Court to establish by rule the procedure under which the Court of Appeals decides which of its opinions are to be published. Sub. (1) provides for a committee of judges of the Court of Appeals to make this decision.

As a safeguard against any mistakes as to nonpublication, sub. (4) adopts the procedure of the United States Court of Appeals for the Seventh Circuit in permitting a person to request that an unpublished opinion be published. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (4) is amended to delete the prior requirement that a motion had to be filed in order to ask the Court of Appeals to have one of its unreported opinions published in the official reports of the Court of Appeals. Requiring a motion to be filed led to confusion in some instances because the person requesting the opinion to be published may not be a party to the appeal decided by the opinion and uncertainty can occur as to who should be served with a copy of the motion and given an opportunity to respond. The requirement to file a motion has been replaced by the need to simply make a request to the Court of Appeals for publication of an unreported opinion. [Re Order effective Jan. 1, 1980]

Court of Appeals Note, 1997: A request under this paragraph [sub. (4) (c)] does not affect the time under sec. (Rule) 809.62 for filing a petition for review. As in the case of reconsideration of a Court of Appeals decision or opinion, withdrawal of an opinion renders that opinion a nullity. Accordingly, a petition for review of that opinion filed prior to its withdrawal is of no effect, except that the petitioner may incorporate it by reference in a petition for review of the opinion subsequently issued in the appeal or proceeding.

Court of Appeals Note, 1997: The Court of Appeals recognizes that many of its opinions are issued as per curiam opinions that should not be published under sec. (Rule) 809.23 (1) (b) 5., Stats. This amendment [of sub. (4)] establishes a procedure whereby a person may request that a per curiam opinion be withdrawn, authored and recommended for publication. The amendment also expressly states that an opinion issued by a single judge of the Court of Appeals under s. 752.31 (2) and (3), Stats., will not be published.

Judicial Council Note, 2008: Subsection (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

Citing an unpublished opinion of the court of appeals subjected the attorney to a $50 fine. Tamminen v. Aetna Casualty & Surety Co., 109 Wis. 2d 536, 327 N.W.2d 55 (1982).

Sub. (3) does not ban citation to circuit court opinions. Brandt v. LIRC, 160 Wis. 2d 353, 466 N.W.2d 673 (Ct. App. 1991).

Citation to an unpublished court of appeals decision to show a conflict between districts for purposes of s. 809.62 (1) (d) is appropriate. State v. Higginbotham, 162 Wis. 2d 978, 471 N.W.2d 24 (1991).

A party's invitation to the court of appeals to consider an unpublished opinion, or even a naked citation to it, violates the letter and spirit of sub. (3). Kuhn v. Allstate Co., 181 Wis. 2d 453, 510 N.W.2d 826 (Ct. App. 1993).

Only the supreme court has the power to overrule, modify, or withdraw language from a published opinion of the court of appeals. Cook v. Cook, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), 95-1963.

The rule against citing unpublished cases is essential to the reduction of the overwhelming number of published opinions and is a necessary adjunct to economical appellate court administration. Unless and until the nonpublication rule is changed, violations of this rule will not be tolerated. State v. Milanes, 2006 WI App 259, 297 Wis. 2d 684, 727 N.W.2d 94, 06-0014.

The noncitation rule and the concept of stare decisis. Walther. 61 MLR 581 (1978).

Publication of court of appeals' opinions. Scott. WBB July 1988.

Citing Unpublished Opinions in Wisconsin State and Federal Tribunals. Sefarbi & Zaporski. Wis. Law. Nov. 2004.

809.24 Rule (Reconsideration). (1) Except as provided in sub. (4), a party may file a motion for reconsideration in the court of appeals within 20 days after the date of a decision issued pursuant to s. 752.41 (1). The motion must state with particularity the points of law or fact alleged to be erroneously decided in the decision and must include supporting argument. No separate memorandum in support of the motion is permitted unless subsequently ordered by the court. The court may order a response before issuing an amended decision. No response to the motion is permitted unless ordered by the court. The motion and any response shall not exceed 5 pages if a monospaced font or handwriting is used, or 1,100 words if a proportional serif font is used.

(2) In response to a motion for reconsideration, the court shall issue an amended decision or the court shall issue an order denying the motion.

(3) Nothing in this section prohibits the court from reconsidering a decision on its own motion at any time prior to remittitur if no petition for review is filed under s. 809.62 or, if a petition for review is filed, within 30 days after filing the petition for review.

(4) No motion for reconsideration of a court of appeals decision issued under s. 809.105 or 809.107 is permitted.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 390 s. 252; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; 2009 a. 25; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1981: Rule 809.24 is amended to refer properly to the petition for supreme court review of decisions of the court of appeals. The rule has been redrafted stylistically. No substantive change is intended. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: Section 809.24 is amended to conform with the court of appeals' internal operating procedures, and to provide an orderly procedure for reconsideration. Reconsideration is intended for those rare cases in which the court of appeals overlooks or misapprehends relevant and material facts or law, not for cases in which a party simply disagrees with the court of appeals. Presentation of new facts or alternate legal arguments is not appropriate on reconsideration. Reconsideration is not permitted in s. 809.105 proceedings related to parental consent prior to performance of abortion due to the abbreviated appellate time periods provided in s. 809.105. Service requirements of s. 801.14 (4) apply. The time for filing a motion for reconsideration cannot be extended. See s. 809.82 (2) (e). [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: The reference to an "order" of the court of appeals is deleted. Prior to 2001 WI 39, s. 809.24 applied to a "decision" of the court. To clarify that a summary disposition order was subject to reconsideration under s. 809.24, a reference to "order" was added by 2001 WI 39. That amendment created confusion as to whether procedural orders issued by the court during the pendency of an appeal could be reconsidered under s. 809.24. However, reconsideration of procedural orders is available under s. 809.14. To eliminate the confusion created by 2001 WI 39, a reference to s. 752.41 (1) was added and "order" was deleted. See *In Interest of A.R.*, 85 Wis. 2d 444, 446, 270 N.W.2d 581 (1978) ("decision" as used in s. 752.41 (1) is the final decision disposing of the appeal).

The amendment also eliminates the requirement that the court of appeals order a response to a motion for reconsideration prior to amending a decision. Often a motion for reconsideration will bring the court's attention to a minor factual misstatement that may be corrected without the benefit of a response. The court of appeals retains the option to order that a response be filed, if it determines that a response will assist the court. [Re Order No. 02-01 effective January 1, 2003.]

809.25 Rule (Costs and fees). (1) COSTS. (a) Costs in a civil appeal are allowed as follows unless otherwise ordered by the court:

1. Against the appellant before the court of appeals when the appeal is dismissed or the judgment or order affirmed.
2. Against the respondent before the court of appeals when the judgment or order is reversed.
3. Against the petitioner before the supreme court when the judgment of the court of appeals is affirmed by the supreme court.
4. Against the respondent before the supreme court when the judgment of the court of appeals is reversed by the supreme court and the costs in the court of appeals are canceled and may be taxed by the supreme court as costs against another party.
5. In all other cases as allowed by the court.

(b) Allowable costs include:

1. Cost of printing and assembling the number of copies of briefs and appendices required by the rules to be served by traditional methods, not to exceed the rates generally charged in Dane County, Wisconsin, for offset printing of camera-ready copy and assembling;
2. Fees charged by the clerk of the court;
3. Cost of the preparation of the transcript of testimony or for appeal bonds;
4. Fees of the clerk of the trial court for preparation of the record on appeal;
5. Other costs as directed by the court.

(c) A party seeking to recover costs in the court shall file a statement of the costs within 14 days of the filing of the decision of the court. An opposing party may file, within 11 days after service of the statement, a motion objecting to the statement of costs.

(d) Costs allowed by the court are taxed by the clerk of the court of appeals irrespective of the filing by a party of a petition for review in the supreme court. In the event of review by the supreme court, costs are taxed by the clerk of the supreme court as set forth in pars. (a) and (b). The clerk of the supreme court shall include in the remittitur the costs allowed in the court. The clerk of circuit court shall enter the judgment for costs in accordance with s. 806.16.

(2) FEES. (a) The clerk of the court shall charge the following fees:

1. For filing an appeal, cross-appeal, petition for review, petition to bypass, or other proceeding, $195.
2. For making a copy of a record, paper, or opinion of the court and comparing it to the original, 40 cents for each page.
3. For comparing for certification of a copy of a record, entry or paper, when the copy is furnished by the person requesting its certification, 25 cents for each page.
4. For a certificate and seal, $1, except for an attorney's certificate of good standing, $3.

(b) The state is exempt from payment of the fees set forth in par. (a) 1. to 4., except that the clerk is not obligated to supply the state with free copies of opinions.

(c) The clerk of the court of appeals may refuse to file, record, certify, or render any other service without prepayment or waiver of the fees established by this section.

(3) FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. A motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, no later than the filing of the cross-respondent's brief. This subsection does not apply to appeals or cross-appeals under s. 809.107, 809.30, or 974.05.

(b) The costs, fees and attorney fees awarded under par. (a) may be assessed fully against the appellant or cross-appellant or the attorney representing the appellant or cross-appellant or may be assessed so that the appellant or cross-appellant and the attorney each pay a portion of the costs, fees and attorney fees.

(c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 316, 317; 1981 c. 390 ss. 220, 252; 1985 a. 29; Sup. Ct. Order, 151 Wis. 2d xvii (1989); 1995 a. 224; 1997 a. 254; 1999 a. 85; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; 2003 a. 33; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: Most of the provisions of former ss. 251.23 and 251.90 are retained. The major change is to provide that execution for costs in the Court of Appeals is to be had in the trial court in accordance with Rule 806.16 rather than in the Court of Appeals. The Judicial Council did not review the adequacy of the fees and thus made no recommendations on them. It is suggested, however, that many of the fees appear to be out of date and should be revised. This should be done in connection with a general review of fees in all courts. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (1) (a) and (d), which governs costs that are allowed in an appeal to the Court of Appeals or a review by the Supreme Court, have been amended for purposes of clarification.

A provision has been added to clarify that costs are taxed by the clerk in the Court of Appeals irrespective of the filing of a petition for review in the Supreme Court. In the event of review by the Supreme Court, a provision has been added specifically stating that costs are allowed against a petitioner in a case before the Supreme Court when the decision of that court affirms a judgment of the Court of Appeals.

An additional clarifying provision has been added allowing costs against a respondent in a case before the Supreme Court when the petitioner before the Supreme Court has achieved reversal of a judgment of the Court of Appeals. The provision further states that the costs that were allowed when the case was originally decided by the Court of Appeals are canceled. [Re Order effective Jan. 1, 1980]

Judicial Council Committee's Note, 1981: Sub. (2) (a) 1. is amended to correct the reference from a petition to appeal to a petition for review. The supreme court reviews the decisions of the court of appeals. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: The 7-day time limit in sub. (1) (c) was changed to 11 days. Please see the comment to s. 808.07 (6) concerning time limits. [Re Order No. 00-02 effective July 1, 2001]

An appeal was frivolous when an assertion of trial court error was without any reasonable basis in law or equity and there was no argument that existing law should have been extended, modified, or reversed. In Matter of Estate of Koenigsmark, 119 Wis. 2d 394, 351 N.W.2d 169 (Ct. App. 1984).

Tax protesters appealing without counsel were properly assessed costs under sub. (3) (c) 2. Tracy v. Department of Revenue, 133 Wis. 2d 151, 394 N.W.2d 756 (Ct. App. 1986).

Restricting access to courts as a sanction for a frivolous action was appropriate when the order was narrowly tailored to balance the interests of public access to courts, res judicata, and the public's right not to have frivolous litigation be a drain on public resources. Minniecheske v. Griesbach, 161 Wis. 2d 743, 468 N.W.2d 760 (Ct. App. 1991).

Asking the court of appeals to reweigh the testimony of witnesses and to reach a conclusion regarding credibility contrary to that reached by a trial judge was frivolous. Lessor v. Wangelin, 221 Wis. 2d 659, 586 N.W.2d 1 (Ct. App. 1998), 97-2974.

A frivolous appeal filed by a non-lawyer results in the same harm as if it were filed by a lawyer. It would not be fair or logical to say that had a lawyer filed the appeal costs would have been awarded but to deny recovery because the appeal was presented by a pro se litigant. Holz v. Busy Bees Contracting, Inc. 223 Wis. 2d 598, 589 N.W.2d 633 (Ct. App. 1998), 98-1076.

While only an appellate court can find an appeal frivolous, the case may be remanded to the circuit court to determine the amount of attorney fees to be awarded. Lucarelli v. Vilas County, 2000 WI App 157, 238 Wis. 2d 84, 616 N.W.2d 153, 99-2827.

In addition to an order to pay the respondent's costs, fees, and attorney fees, an appellant whose appeal was found frivolous after his brief was stricken for being offensive, scurrilous, and inappropriate was barred from filing any future proceedings in the court of appeals and the circuit court arising from, relating to, or involving the respondents. Puchner v. Hepperla, 2001 WI App 50, 241 Wis. 2d 545, 625 N.W.2d 609, 98-2853.

The circuit court's award of fees to the respondent due to the appellant's overlitigating by filing multiple frivolous issues on appeal, in violation of the circuit court's order, was not prevented by a court of appeals finding that no fees could be awarded under sub. (3). Zhang v. Yu, 2001 WI App 267, 248 Wis. 2d 913, 637 N.W.2d 754, 00-3237.

In order to be awarded costs, fees, and reasonable attorney fees, the moving party must prove that the entire appeal presented was frivolous. If an argument advanced has arguable merit, then the appeal is not frivolous. Baumeister v. Automated Products, Inc. 2004 WI 148, 277 Wis. 2d 21, 690 N.W.2d 1, 02-1003.

The trial court cannot make a finding that an appeal is frivolous and is without authority to order the payment of frivolous costs and fees associated with an appeal. Morters v. Aiken & Scoptur, 2006 WI App 46, 289 Wis. 2d 833, 712 N.W.2d 71, 05-0703.

809.26 Rule (Remittitur). (1) The clerk of the court of appeals shall transmit to the circuit court the judgment and decision or order of the court and the record in the case filed pursuant to s. 809.15 31 days after the filing of the decision or order of the court, or as soon thereafter as practicable. If a petition for review is filed pursuant to s. 809.62, the transmittal is stayed until the supreme court rules on the petition. If a motion for reconsideration is filed under s. 809.24, the transmittal is stayed until the court files an order denying the motion, or files an amended decision or order, and the subsequent expiration of any period for filing a petition for review.

(2) If the supreme court grants a petition for review of a decision of the court of appeals, the supreme court upon filing its decision shall transmit to the trial court the judgment and opinion of the supreme court and the complete record in the case unless the case is remanded to the court of appeals with specific instructions.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); 1981 c. 390 s. 252; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii.

Judicial Council Committee's Note, 1978: Former s. 817.35 is embodied in this section except that the time for issuance of the remittitur is reduced from 60 to 31 days. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: This section is amended by creating a sub. (2) that specifically authorizes the Supreme Court after filing its decision in the review of a decision from the Court of Appeals to remit directly to the trial court the complete record of the case without the necessity of returning the case to the Court of Appeals for remittitur to the trial court. The only exception to this new procedure will occur when the Supreme Court remands a case to the Court of Appeals with some specific instructions that the Court of Appeals is required to follow. [Re Order effective Jan. 1, 1980].

Judicial Council Note, 2002: Subsection (1) is amended to permit the clerk of courts some flexibility in the 31-day remittitur deadline to accommodate workload fluctuation. By Supreme Court Order 00-02, 2001 WI 39, "within" was added immediately preceding "31 days." The Judicial Council had not intended to suggest changing the substance of existing time parameters for remittitur, when it petitioned for that amendment, but merely proposed the additional word for ease of reading. Since that amendment, it has been argued that the addition of "within" permits remittitur prior to the expiration of the 31-day period. However, the 31-day period coincides with the time limit for filing a petition for review. Absent stipulation among the parties that no petition for review will be filed, remittitur should not occur before the expiration of the petition for review deadline. [Re Order No. 02-01 effective January 1, 2003]

An appellate court's jurisdiction ceases upon remittitur in the absence of inadvertence, fraud, or void judgment. The inadvertence exception applies to the act of remitting the record itself, which must be inadvertently done. State ex rel. Fuentes v. Court of Appeals, 225 Wis. 2d 446, 593 N.W.2d 48 (1999), 98-1534.

SUBCHAPTER III

APPEAL PROCEDURE IN COURT OF APPEALS IN S. 971.17 PROCEEDINGS AND IN CRIMINAL AND CH. 48, 51, 55, 938, AND 980 CASES

809.30 Rule (Appeals in s. 971.17 proceedings and in criminal, ch. 48, 51, 55, 938, and 980 cases). (1) DEFINITIONS. In this subchapter:

(a) "Final adjudication" means the entry of a final judgment or order by the circuit court in a s. 971.17 proceeding, in a criminal case, or in a ch. 48, 51, 55, 938, or 980 case, other than a termination of parental rights case under s. 48.43, a guardianship proceeding under s. 48.9795, or a parental consent to abortion case under s. 48.375 (7).

(b) "Person" means any of the following:

1. A defendant seeking postconviction relief in a criminal case.

2. A party, other than the state, seeking postdisposition relief in a case under ch. 48, other than a termination of parental rights case under s. 48.43, a guardianship proceeding under s. 48.9795, or a parental consent to abortion case under s. 48.375 (7).

3. A party, other than the state, seeking postdisposition relief in a case under ch. 938.

4. A subject individual or ward seeking postdisposition relief in a s. 971.17 proceeding or a case under ch. 51, 55, or 980.

5. Any other person who may appeal under ss. 51.13 (5), 51.20 (15), or 55.20.

(c) "Postconviction relief" means an appeal or a motion for postconviction relief in a criminal case, other than an appeal, motion, or petition under ss. 302.113 (7m) or (9g), 973.19, 973.195, 973.198, 974.06, or 974.07 (2). In a ch. 980 case, the term means an appeal or a motion for postcommitment relief under s. 980.038 (4).

(d) "Postdisposition relief" means an appeal or a motion for relief under this subchapter from a circuit court's final adjudication.

(e) "Prosecutor" means a district attorney, corporation counsel, or other attorney authorized by law to represent the state in a criminal case, a proceeding under s. 971.17, or a case under ch. 48, 51, 55, 938, or 980.

(f) "Sentencing" means the imposition of a sentence, a fine, or probation in a criminal case. In a ch. 980 case, the term means the entry of an order under s. 980.06.

(2) APPEAL; POSTCONVICTION OR POSTDISPOSITION MOTION. (a) *Appeal procedure; counsel to continue*. A person seeking postconviction relief in a criminal case; a person seeking postdisposition relief in a case under ch. 48 other than a termination of parental rights case under s. 48.43, a guardianship proceeding under s. 48.9795, or a parental consent to abortion case under s. 48.375 (7); or a person seeking postdisposition relief in a s. 971.17 proceeding or in a case under ch. 51, 55, 938, or 980 shall comply with this section. Counsel representing the person at sentencing or at the time of the final adjudication shall continue representation by filing a notice under par. (b) if the person desires to pursue postconviction or postdisposition relief unless counsel is discharged by the person or allowed to withdraw by the circuit court before the notice must be filed.

(b) *Notice of intent to pursue postconviction or postdisposition relief*. Within 20 days after the date of sentencing or final adjudication, the person shall file in circuit court and serve on the prosecutor and any other party a notice of intent to pursue postconviction or postdisposition relief. If the record discloses that sentencing or final adjudication occurred after the notice of intent was filed, the notice shall be treated as filed after sentencing or final adjudication on the day of the sentencing or final adjudication. The notice shall include all of the following:

1. The case name and number.

2. An identification of the judgment or order from which the person intends to seek postconviction or postdisposition relief and the date on which the judgment or order was entered.

3. The name and address of the person and his or her trial counsel.

4. Whether the person's trial counsel was appointed by the state public defender and, if so, whether the person's financial circumstances have materially improved since the date on which his or her indigency was determined.

5. Whether the person requests the state public defender to appoint counsel for purposes of postconviction or postdisposition relief.

6. Whether a person who does not request the state public defender to appoint counsel will represent himself or herself or will be represented by retained counsel. If the person has retained counsel to pursue postconviction or postdisposition relief, counsel's name and address shall be included.

(c) *Clerk to send materials*. Within 5 days after a notice under par. (b) is filed, the clerk of circuit court shall:

1. If the person requests representation by the state public defender for purposes of postconviction or postdisposition relief, send to the state public defender's appellate intake office a copy of the notice that shows the date on which it was filed or entered, a copy of the judgment or order specified in the notice that shows the date on which it was filed or entered, a list of the court reporters for each proceeding in the action in which the judgment or order was entered, and a list of those proceedings in which a transcript has been filed with the clerk of circuit court.

2. If the person does not request representation by the state public defender, send or furnish to the person, if appearing without counsel, or to the person's attorney if one has been retained, a copy of the judgment or order specified in the notice that shows the date on which it was filed or entered, a list of the court reporters for each proceeding in the action in which the judgment or order was entered, and a list of those proceedings in which a transcript has been filed with the clerk of circuit court.

(d) *Indigency redetermination*. Except as provided in this paragraph, whenever a person whose trial counsel is appointed by the state public defender files a notice under par. (b) requesting public defender representation for purposes of postconviction or postdisposition relief, the prosecutor may, within 5 days after the notice is served and filed, file in the circuit court and serve upon the state public defender a request that the person's indigency be redetermined before counsel is appointed or transcripts are requested. This paragraph does not apply to a child who is entitled to be represented by counsel under s. 48.23 or 938.23 or a person who is entitled to be represented by counsel under s. 51.60 (1), 55.105, or 980.03 (2) (a).

(e) *State public defender appointment of counsel; transcript and circuit court case record request*. Within 30 days after the state public defender appellate intake office receives the materials from the clerk of circuit court under par. (c), the state public defender shall appoint counsel for the person and request a transcript of the court reporter's verbatim record and a copy of the circuit court case record, except that if the person's indigency must first be determined or redetermined the state public defender shall do so, appoint counsel, and request transcripts and a copy of the circuit court case record within 50 days after the state public defender appellate intake office receives the material from the clerk of circuit court under par. (c).

(f) *Person not represented by public defender; transcript and circuit court case record request*. A person who does not request representation by the state public defender for purposes of postconviction or postdisposition relief shall request a transcript of the court reporter's verbatim record, and may request a copy of the circuit court case record, within 30 days after filing a notice under par. (b). A person who is denied representation by the state public defender for purposes of postconviction or postdisposition relief shall request a transcript of the court reporter's verbatim record, and may request a copy of the circuit court case record, within 90 days after filing a notice under par. (b).

(fm) *Transcript and circuit court case record request in chs. 48 and 938 proceedings*. A child or juvenile who has filed a notice of intent to pursue relief from a judgment or order entered in a ch. 48 or 938 proceeding shall be furnished at no cost a transcript of the proceedings or as much of the transcript as is requested, and may request a copy of the circuit court case record. To obtain the transcript and circuit court case record at no cost, an affidavit must be filed stating that the person who is legally responsible for the child's or juvenile's care and support is financially unable or unwilling to purchase the transcript and a copy of the circuit court case record.

(g) *Filing and service of transcript and circuit court case record*. 1. The clerk of circuit court shall serve a copy of the circuit court case record on the person within 60 days after receipt of the request for the circuit court case record.

2. The court reporter shall file the transcript with the circuit court and serve a copy of the transcript on the person within 60 days of the request for the transcript. Within 20 days after the request for a transcript of postconviction or postdisposition proceedings brought under sub. (2) (h), the court reporter shall file the original with the circuit court and serve a copy of that transcript on the person. The reporter may seek an extension under s. 809.11 (7) for filing and serving the transcript.

(h) *Notice of appeal, postconviction or postdisposition motion*. The person shall file in circuit court and serve on the prosecutor and any other party a notice of appeal or motion seeking postconviction or postdisposition relief within 60 days after the later of the service of the transcript or circuit court case record. The person shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised. A postconviction or postdisposition motion under this section may not be accompanied by a notice of motion and is made when filed. A notice of appeal filed under this section shall conform to the requirements set forth in s. 809.10. The appeal shall be initiated and docketed in accordance with ss. 809.10 and 809.11.

(i) *Order determining postconviction or postdisposition motion*. Unless an extension is requested by a party or the circuit court and granted by the court of appeals, the circuit court shall determine by an order the person's motion for postconviction or postdisposition relief within 60 days after the filing of the motion or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion.

(j) *Appeal from judgment and order*. The person shall file in circuit court and serve on the prosecutor and any other party a notice of appeal from the judgment of conviction and sentence or final adjudication and, if necessary, from the order of the circuit court on the motion for postconviction or postdisposition

relief within 20 days of the entry of the order on the postconviction or postdisposition motion. A notice of appeal filed under this section shall conform to the requirements set forth in s. 809.10. The appeal shall be initiated and docketed in accordance with ss. 809.10 and 809.11. Appeals in cases under chs. 48, 51, 55, and 938 are subject to the docketing statement requirements of s. 809.10 (1) (d) and may be eligible for the expedited appeals program in the discretion of the court.

(k) *Transmittal of record*. Except as otherwise provided in ss. 809.14 (3) and 809.15 (4) (b) and (c), the clerk of circuit court shall transmit the record on appeal to the court of appeals as soon as prepared but in no event more than 40 days after the filing of the notice of appeal. Subsequent proceedings in the appeal are governed by the procedures for civil appeals.

(L) *Appeals under s. 974.06 or 974.07*. An appeal under s. 974.06 or 974.07 is governed by the procedures for civil appeals.

(3) APPEALS BY STATE OR OTHER PARTY; APPOINTMENT OF COUNSEL. In a case in which the state of Wisconsin, the representative of the public, any other party, or any person who may appeal under s. 51.13 (5), 51.20 (15), or 55.20 appeals and the person who is the subject of the case or proceeding is a child or claims to be indigent, the court shall refer the person who is the subject of the case or proceeding to the state public defender for the determination of indigency and the appointment of legal counsel under ch. 977.

(4) MOTION TO WITHDRAW AS APPOINTED COUNSEL. (a) If postconviction, postdisposition, or appellate counsel appointed for the person under ch. 977 seeks to withdraw from the case, counsel shall serve a motion to withdraw upon the person and upon the appellate division intake unit in the Madison appellate office of the state public defender. If the motion is filed before the notice of appeal is filed, the motion shall be filed in circuit court. If the motion is filed after a notice of appeal has been filed, the motion shall be filed in the court of appeals. Service of the motion to withdraw on the state public defender is not required when the motion is filed by an assistant state public defender or when a no-merit report is filed with the motion.

(b) Within 20 days after receipt of the motion under par. (a), the state public defender shall determine whether successor counsel will be appointed for the person and shall notify the court in which the motion was filed of the state public defender's determination.

(c) Before determining the motion to withdraw, the court shall consider the state public defender's response under par. (b) and whether the person waives the right to counsel.

(d) When the motion to withdraw is filed in circuit court, appointed counsel shall prepare and serve a copy of the order determining counsel's motion to withdraw upon the person and the appellate division intake unit in the Madison appellate office of the state public defender within 14 days after the court's determination.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 390 s. 252; Sup. Ct. Order, 112 Wis. 2d xvii (1985); Sup. Ct. Order, 123 Wis. 2d xi (1985); 1985 a. 332; Sup Ct. Order, 136 Wis. 2d xxv (1987); Sup. Ct. Order, 161 Wis. 2d xiii (1991); Sup. Ct. Order No. 93-19, 179 Wis. 2d xxiii (1994); 1993 a. 16, 395, 451; 1995 a. 77; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; 2001 a. 16; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; 2005 a. 264, 434; 2007 a. 20; Sup. Ct. Order No. 04-08, 2008 WI 108, filed 7-30-08, eff. 1-1-09; 2009 a. 26, 28, 180, 276; 2011 a. 38; 2017 a. 184, 359; Sup. Ct. Order No. 19-01, 2019 WI 44, 386 Wis. 2d xvii; 2019 a. 109; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21; 2021 a. 238 ss. 31, 45.

Judicial Council Committee's Note, 1978: Many changes are made in prior practice in criminal cases and in protective placement, juvenile and mental commitment cases. Under the former procedure counsel, usually the State Public Defender appointed by the Supreme Court, was required to order a transcript, wait for its preparation, review it, present to the trial court by a post-trial motion any issues which the defendant desired to raise on appeal even if the issue had been presented to and decided by the court during the trial, [see State v. Charette, 51 Wis. 2d 531, 187 N.W.2d 203 (1971) and State v. Wuensch, 69 Wis. 2d 467, 230 N.W.2d 665 (1975)], and after the court ruled on the motion, appeal both the original conviction and the denial of the post-trial motion to the Supreme Court. Often a year or more elapsed between the sentencing of the defendant and the docketing of his appeal in the Supreme Court. This delay, combined with the delay in the Supreme Court caused by its backlog, often resulted in an appeal not being decided by the Supreme Court until two or three years after conviction.

The procedures in this section are designed to expedite the entire process by putting time limits on each step and by eliminating the necessity of each issue being presented twice to the trial court.

The term "postconviction relief", as used in this Rule, includes new trial, reduction of sentence and any other type of relief which the trial court is authorized to give, other than under s. 974.06.

Extensions of time for taking various steps under this section can be granted by the court of appeals under Rule 809.82. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (1) (h) is amended to increase from 10 to 20 days the period for a defendant to file a notice of appeal after entry of a trial court's order denying postconviction relief. It is sometimes difficult to meet the present 10-day requirement for filing an appeal under this subsection due to the delays that may occur in the prompt delivery by mail of the order of the trial court on a motion for postconviction relief. Increasing the time period by 10 days does not unduly lengthen the appellate process for determination of an appeal on its merits. [Re Order effective Jan. 1, 1980]

Judicial Council Committee's Note, 1981: Sub. (1) (e) is amended to increase from 40 to 60 days the period for the court reporter to complete and serve a copy of the transcript on the defendant and sub. (1) (f) is amended to increase from 30 to 60 days the period for the defendant to either file a notice of appeal or motion seeking postconviction relief. The previous time periods were often insufficient for preparation of the transcript and for review of the transcript and record by the defendant determining which, if any, postconviction proceedings to commence.

Sub. (1) (e) is clarified to establish that the original of the transcript is filed with the trial court by the court reporter whereas a copy is served by the court reporter on the defendant. Also, the transcript of postconviction proceedings must be filed and served by the court reporter within 20 days of ordering by the defendant.

Sub. (1) (i) is amended to provide that the clerk of the trial court shall transmit the record to the court of appeals no later than 40 days after the filing of the notice of appeal. Presently transmittal of the record is governed by Rule 809.15 (4) which allows up to 90 days from the filing of the notice of appeal.

The total time period from ordering the transcript to transmittal of the record to the court of appeals has not been altered by these amendments.

Judicial Council Committee's Note, 1978, explained that extensions of time for taking various steps under Rule 809.30 can be granted by the court of appeals under Rule 809.82. In State v. Rembert, 99 Wis. 2d 401, 299 N.W.2d 292 (Ct. App. 1980), the court of appeals stated that its authority to extend the time periods of Rule 809.30 is to the exclusion of the trial court. The court of appeals, not the trial court, is responsible for monitoring, enforcing or extending the time periods of Rule 809.30. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 1984: Requiring that the appellate process be initiated by filing a notice in the trial court within 20 days after sentencing is intended to:

Expedite the process; the information needed for a decision regarding postconviction relief is available to the defendant at sentencing and the decision can usually be made shortly thereafter.

Emphasize trial counsel's duties to counsel the defendant about the decision to seek postconviction relief and to continue representation until appellate counsel is retained or appointed. SCR 20.34 (2) (d); Whitmore v. State, 56 Wis. 2d 706, 203 N.W.2d 56 (1973).

Create a record in the trial court showing whether the postconviction process has been timely invoked.

Notify the judge, clerk, court reporter and district attorney that postconviction relief is contemplated and allow the district attorney to request a redetermination of indigency in public defender cases.

Give the public defender the information needed to appoint counsel and order transcripts promptly, and to decide whether the defendant's indigency must first be determined or redetermined. [Re order effective July 1, 1985]

Judicial Council Note, 1986: Sub. (1) is amended to clarify the application of the statute when the appeal is taken from the final judgment or order in a non-criminal case.

Sub. (2) (fm) is prior s. 48.47 (2), renumbered for more logical placement in the statutes. [Re Order eff. 7-1-87]

Judicial Council Note, 2001: Subtitles have been added. Subsection (2) (e) was revised to amend the time for appointing appellate counsel and to clarify that a defendant represented by appointed counsel must request a copy of the circuit court case record from the circuit court. Subsection (2) (f) was amended to clarify that a defendant not represented by the state public defender may request a copy of the circuit court case record from the circuit court. The second sentence of sub. (2) (f) sets a time limit for a defendant who has unsuccessfully sought public defender representation under sub. (2) (e) to request the transcripts and circuit court case record. Subsection (2) (g) was amended to require the circuit court clerk to send the circuit court case record to the defendant within 60 days after receipt of the request. Subsection (2) (h) was revised to require the defendant to file the notice of appeal either within 60 days after service of the last transcript or the circuit court case record, whichever occurs later. The second sentence of sub. (2) (h) specifies that a notice of motion shall not be filed with a s. 809.30 postconviction motion. If the circuit court grants a hearing on the motion, the circuit court will notify the parties of the date.

The first clause of sub. (2) (i) specifies that an extension may be granted by the court of appeals.

Subsection (3) was revised to clarify that it applies in all appeals utilizing s. 809.30, including cases under chs. 48, 51, 55, and 938.

Subsection (4) establishes a procedure for making and determining motions to withdraw by appointed counsel. This rule does not change existing law concerning when a withdrawal motion is necessary. See e.g. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 622-24, 516 N.W.2d 362 (1994).

Often motions to withdraw are the result of a disagreement between appointed counsel and the defendant, sometimes inaccurately called a "conflict," about the existence of a meritorious issue for appeal, or about the manner in which any such issue should be raised. It is counsel's duty to decide what issues in a case have merit for an appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). Postconviction counsel is entitled to exercise reasonable professional judgment in winnowing out even arguable issues in favor of others perceived to be stronger. *Id*. Counsel's failure to raise an issue on direct appeal may prevent the defendant from raising it in a subsequent s. 974.06 collateral review proceeding, absent "sufficient reason." *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

The rules of appellate procedure require that a defendant choose whether to proceed with the assistance of appointed counsel or proceed *pro se*. *State v. Redmond*, 203 Wis. 2d 13, 552 N.W.2d 115 (Ct. App. 1996). A defendant has neither the right to appointed counsel of choice nor the right to insist that a particular issue be raised. *Oimen v. McCaughtry*, 130 F.2d 809 (7th Cir. 1997). "The defendant may terminate appellate counsel's representation and proceed *pro se* or the defendant may allow postconviction relief to continue based on counsel's brief and then seek relief on the grounds of ineffective assistance of appellate counsel." *State v. Debra A.E.,* 188 Wis. 2d 111, 137-39, 523 N.W.2d 727 (1994). On ineffective assistance of appellate counsel claims, the court will determine whether counsel's choice of issues met the objective standard of reasonableness. *Gray v. Greer*, 778 F.2d 350 (7th Cir. 1985).

The state public defender will not appoint successor counsel where a defendant disagrees with the legal conclusions of appointed counsel or when a defendant wants a second opinion as to the merits of an appeal. To do so would unduly delay the disposition of the appeal, and would be contrary to the interests of justice. Wis. Admin. Code s. PD 2.04.

If a defendant elects to waive counsel and proceed *pro se*, the court must find that the defendant has been provided with clear warnings with respect to forfeiture of the right to counsel and the dangers of self-representation. *State v. Cummings*, 199 Wis. 2d 721, 546 N.W.2d 406 (1996). [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: The terminology throughout s. 809.30 is amended to clarify that persons seeking to appeal final judgments or orders in criminal, ch. 48 (child or unborn child in need of protection or services, guardianship or adoption), ch. 51 (civil commitment), ch. 55 (protective placement), and ch. 938 (delinquency or juvenile justice) cases must comply with this rule. Prior language referred to all such persons as defendants and to all appeal proceedings as "postconviction," and was confusing to parties and practitioners.

Amended sub. (2) (h) provides a cross-reference to the statutory section governing the requirements of a notice of appeal. The requirement of a motion for postconviction or postdisposition relief on grounds other than sufficiency of the evidence or issues previously raised is consistent with s. 974.02 (2).

Prior to 2001 WI 39, effective 7/1/01, this rule did not specify who could request an extension of time for a circuit court to decide a postconviction motion. Sub. (2) (i) is amended to permit the circuit court, the state, the defendant, or any other party to request an extension of time for the circuit court to decide a postconviction or postdisposition motion.

Subsection (2) (j) is amended for clarification and consistency, and to cross-reference s. 809.10, which contains the requirements governing a notice of appeal. In a criminal case, the prosecutor who represented the state in the circuit court should be served with a copy of the notice of appeal.

The amendment to sub. (4) (a) clarifies that the rule requiring service on the state public defender appellate division is applicable only to postconviction, postdisposition, and appellate appointments. Rule 809.30 (4), 2001 WI 39, effective 7/1/01, is designed to assure that courts acting on motions to withdraw have knowledge of the state public defender's position with respect to appointing successor counsel. Subsection (4) (a) is amended to reflect that withdrawal motions filed by state public defender staff attorneys already contain that information and that the issue of appointment of successor counsel is irrelevant to the court's determination when a no-merit report is filed. [Re Order No. 02-01 effective January 1, 2003]

NOTE: Sup. Ct. Order No. 04-08, 2008 WI 108, states, "The Judicial Council Committee Comments are not adopted, but will be published and may be consulted for guidance in interpreting and applying Wis. Stat. ss. 809.30, 809.32 and 809.62."

Judicial Council Committee Comment, July 2008: The amendment to s. 809.30(2) (b) allows a notice of intent that is filed too early to be deemed filed on the date that a judgment and sentence or other final adjudication is filed. This is consistent with the procedure applicable to civil appeals under s. 808.04 (8). [Re Order No.08-04 effective January 1, 2009]

The court of appeals did not abuse its discretion in refusing to allow a convicted felon to pursue a late appeal. State v. Argiz, 101 Wis. 2d 546, 305 N.W.2d 124 (1981).

The limitation period under sub. (1) (f) [now sub. (2) (h)] cannot begin to run until the entry of an appealable order. In Interest of M.T. 108 Wis. 2d 410, 321 N.W.2d 289 (1982).

For issues on appeal to be considered matters of right, postconviction motions must be made except in challenges to sufficiency of the evidence under s. 974.02 (2). State v. Monje, 109 Wis. 2d 138, 325 N.W.2d 695 (1982).

Because double jeopardy precludes retrial if an appellate court finds a conviction is not supported by sufficient evidence, the court must decide a claim of insufficiency even if there are other grounds for reversal that would not preclude retrial. State v. Ivy, 119 Wis. 2d 591, 350 N.W.2d 622 (1984).

The court may for good cause grant extensions under this section. State v. Harris, 149 Wis. 2d 943, 440 N.W.2d 364 (1989).

A defendant unable to assist counsel or make decisions committed by law to the defendant with a degree of rational reasoning is incompetent to pursue postconviction relief. The process to be followed when a competency issue arises is discussed. State v. Debra A.E., 188 Wis. 2d 111, 523 N.W.2d 727 (Ct. App. 1994).

If a defendant is represented by counsel, the defendant is statutorily barred from proceeding pro se during the pendency of an appeal. State v. Redmond, 203 Wis. 2d 13, 552 N.W.2d 115 (Ct. App. 1996), 94-1544.

A criminal defendant may bring a motion under sub. (2) (h) for a new trial based on newly-discovered evidence. The defendant has the burden of establishing the 5 criteria enumerated by the court by clear and convincing evidence. State v. Brunton, 203 Wis. 2d 195, 552 N.W.2d 452 (Ct. App. 1996), 95-0111.

When a criminal appeal is taken from a plea bargain it brings the entire judgment before the appellate court. When a plea bargain is negated, the proper disposition is to remand the cause for further proceedings on the original charges. State v. Briggs, 218 Wis. 2d 61, 579 N.W.2d 783 (Ct. App. 1998), 97-1558.

A defendant subject to a post-probation revocation sentence cannot use this section and s. 973.19 (1) (b) to raise issues that go to the original judgment, but the defendant may take a direct appeal from a subsequent judgment in order to fully litigate issues initially raised by the resentencing. State v. Scaccio, 2000 WI App 265, 240 Wis. 2d 95, 622 N.W.2d 449, 99-3101.

Section 973.195 creates a separate and specific statutory procedure for requesting a sentence reduction that should be used in place of this section whenever the basis for the modification is a change in law or procedure related to sentencing effective after the inmate was sentenced that would have resulted in a shorter term of a confinement. State v. Torres, 2003 WI App 199, 267 Wis. 2d 213, 670 N.W.2d 400, 03-0233.

Neither sub. (4) or other law requires that a motion to withdraw be filed any time an attorney appointed by the public defender terminates his or her postconviction/appellate representation of a defendant. Counsel for the defendant did not render ineffective assistance by closing his file without first obtaining court permission to withdraw or otherwise seeking a contemporaneous judicial determination that his client had knowingly waived either the right to appeal or the right to counsel. Ford v. Holm, 2004 WI App 22, 269 Wis. 2d 810, 676 N.W.2d 500, 02-1828.

When a defendant seeks modification of the sentence imposed at resentencing, sub. (2) and s. 973.19 require the defendant to file a postconviction motion with the circuit court before taking an appeal. These rules on sentence modification apply even though the sentence imposed at resentencing is identical to a previous sentence and regardless of whether a defendant challenges the original sentence, a sentence after revocation, or the sentence imposed at resentencing. State v. Walker, 2006 WI 82, 292 Wis. 2d 326, 716 N.W.2d 498, 04-2820.

If a defendant does not want a no-merit report, the defendant has 3 choices: 1) fire counsel and proceed pro se; 2) fire counsel and hire private counsel if financially feasible; or 3) direct that the file be closed. A defendant cannot: 1) insist that appointed counsel pursue an advocacy appeal under s. 809.30 despite counsel's view that an appeal would lack arguable merit; 2) alternatively insist on different appointed counsel who will write a brief the way the defendant wants it written; or 3) forbid appointed counsel from filing a no-merit report and then claim that counsel has abandoned him or her when counsel moves to withdraw from representation. Van Hout v. Endicott, 2006 WI App 196, 296 Wis. 2d 580, 724 N.W.2d 692, 04-1192.

Wisconsin affords a convicted person the right to postconviction counsel. It would be absurd to suggest that a person has a right to counsel at trial and on appeal, but no right to counsel at a postconviction proceeding in the circuit court, which is often the precursor to an appeal. However, a defendant does not have the right to be represented by: 1) an attorney he or she cannot afford; 2) an attorney who is not willing to represent the defendant; 3) an attorney with a conflict of interest; or 4) an advocate who is not a member of the bar. State v. Peterson, 2008 WI App 140, 314 Wis. 2d 192, 757 N.W.2d 834, 07-1867.

The court where an alleged ineffective assistance of counsel occurred is the proper forum in which to seek relief unless that forum is unable to provide the relief necessary to address the ineffectiveness claim. The remedy for an attorney's failure to file a notice of intent to pursue postconviction relief is an extension of the timeframe to file the notice. Because the circuit court is without authority to extend the deadline to file a notice of intent to pursue post conviction relief, the proper forum lies in the court of appeals. Kyles v. Pollard, 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805, 12-0378.

The fact that a defendant was deemed competent to stand trial should not create a presumption that the defendant is competent at a later date when the same defendant pursues postconviction relief. State v. Daniel, 2015 WI 44, 362 Wis. 2d 74, 862 N.W.2d 867, 12-2692.

There is no statute directly governing postconviction competency proceedings, but courts will look to s. 971.14 for guidance. Once a defense attorney raises the issue of competency at a postconviction hearing, the burden is on the state to prove by a preponderance of the evidence that the defendant is competent to proceed. State v. Daniel, 2015 WI 44, 362 Wis. 2d 74, 862 N.W.2d 867, 12-2692.

Before a circuit court can require a non-dangerous but incompetent defendant to be involuntarily treated to competency in the context of postconviction proceedings, the circuit court must follow the procedure established in *Debra A.E.*, 188 Wis. 2d 111. *Debra A.E.* fashioned a mandatory process for managing postconviction relief of allegedly incompetent defendants. If this process is followed, a court order for treatment to restore competency will ordinarily be unnecessary because meaningful postconviction relief can be provided even though a defendant is incompetent. In this case, the circuit court acted prematurely by ordering that the defendant be medicated to competency without determining whether and to what extent postconviction proceedings could continue despite the defendant's incompetency. State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, 16-2017.

When a postconviction motion under this section is denied in part and granted in part such that further proceedings are required, an appeal cannot be taken until the further proceedings are completed. State v. Wolfe, 2019 WI App 32, 388 Wis. 2d 45, 931 N.W.2d 298, 18-2268.

Sentence modification by Wisconsin trial courts. Kassel. 1985 WLR 195.

The decision to appeal a criminal conviction: Bridging the gap between the obligations of trial and appellate counsel. 1986 WLR 399.

The decision to appeal: The role of trial counsel under the new rules of criminal appellate procedure. Kempinen. WBB Aug. 1985.

809.31 Rule (Release on bond pending seeking postconviction relief). (1) A defendant convicted of a misdemeanor or felony who is seeking relief from a conviction and sentence of imprisonment or to the intensive sanctions program and who seeks release on bond pending a determination of a motion or appeal shall file in the trial court a motion seeking release.

(2) The trial court shall promptly hold a hearing on the motion of the defendant, determine the motion by order and state the grounds for the order.

(3) Release may be granted if the court finds that:

(a) There is no substantial risk the appellant will not appear to answer the judgment following the conclusion of postconviction proceedings;

(b) The defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice;

(c) The defendant will promptly prosecute postconviction proceedings; and

(d) The postconviction proceedings are not taken for purposes of delay.

(4) In making the determination on the motion, the court shall take into consideration the nature of the crime, the length of sentence and other factors relevant to pretrial release.

(5) The defendant or the state may seek review of the order of the circuit court by filing a motion in the court of appeals under s. 809.14. The party seeking review must attach to its motion a copy of the judgment of conviction or other final judgment or order, the circuit court order regarding release pending appeal, the circuit court statement of reasons for the decision regarding release pending appeal, and the transcript of any release proceedings in the circuit court or a statement explaining why no transcript is available. The party filing the motion shall request a transcript of the court reporter's verbatim record for any proceeding in the circuit court regarding release pending appeal for all parties to the appeal and make arrangements to pay for the transcript within 7 days after the entry of the circuit court order regarding release pending appeal. Within 7 days after the date on which the transcript was requested and arrangements were made for payment, the reporter shall serve copies of the transcript on the parties to the appeal, file the transcript with the circuit court, and notify the clerk of the court of appeals and the parties to the appeal that the transcript has been filed and served. The motion shall be filed within 21 days after the entry of the circuit court order. The opposing party may file a response within 14 days after the filing of the motion.

(6) The court ordering release shall require the defendant to post a bond in accordance with s. 969.09 and may impose other terms and conditions. The defendant shall file the bond in the trial court.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1981 c. 390 s. 252; 1991 a. 39; 1997 a. 232; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; Sup. Ct. Order No. 19-01, 2019 WI 44, 386 Wis. 2d xvii.

Judicial Council Committee's Note, 1978: Section 969.09 provides for release on bond pending appeal and the conditions of the bond. Section 969.01 (2) provides for bond in felony cases after conviction in the discretion of the trial court or by the Supreme Court or a justice thereof or the Court of Appeals or a judge thereof. Neither the statutes nor case law, however, establishes the standards for release or indicates whether the Supreme Court or Court of Appeals is reviewing the action of the trial court or acting de novo. This Rule is intended to meet these deficiencies. The standards for release are those included in the American Bar Association Criminal Justice Standards, Criminal Appeals, s. 2.5. [Re Order effective July 1, 1978]

Judicial Council Note, 2001: Former rules required a party seeking review of a release decision to file a petition for discretionary review, and pay a separate filing fee, generating a separate appeal. The new motion procedure under sub. (5) provides a more efficient mechanism for appellants seeking release pending appeal. No change in the substantive standards governing release decisions is intended. See *State v. Whitty*, 86 Wis. 2d 380, 272 N.W.2d 843 (1978); *State v. Salmon*, 163 Wis. 2d 369, 471 N.W.2d 286 (Ct. App. 1991). [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: Subsection (5) is amended to establish time limits within which a party must request a transcript of the reporter's notes of any circuit court proceeding concerning release pending postconviction relief or appeal, and within which the reporter must file and serve the transcript, and to require the party seeking relief from the circuit court order to request, and make arrangements to pay for, a copy of the transcript for all parties. The amendment also enlarges the time within which a party must file a motion in the court of appeals to allow time to review the transcript before deciding to file a motion. [Re Order No. 02-01 effective January 1, 2003]

Appellate procedure for a petition for bail pending appeal is discussed. State v. Whitty, 86 Wis. 2d 380, 272 N.W.2d 842 (1978).

The power of a circuit court to stay execution of a sentence for legal cause does not include the power to stay sentence while a collateral attack is being made on a conviction by habeas corpus proceeding in federal court. This rule has no application to that situation. State v. Shumate, 107 Wis. 2d 460, 319 N.W.2d 834 (1982).

The merits of the underlying appeal may be considered by the trial court in considering release pending appeal and by the appellate court in determining whether immediate review of the order denying release pending appeal is necessary. State v. Salmon, 163 Wis. 2d 369, 471 N.W.2d 286 (Ct. App. 1991).

809.32 Rule (No merit reports). (1) NO-MERIT REPORT, RESPONSE, AND SUPPLEMENTAL NO-MERIT REPORT. (a) *No-merit report*. If an attorney appointed under s. 809.30 (2) (e) or ch. 977 concludes that a direct appeal on behalf of the person would be frivolous and without any arguable merit within the meaning of *Anders v. California*, 386 U.S. 738 (1967), and the person requests that a no-merit report be filed or declines to consent to have the attorney close the file without further representation by the attorney, the attorney shall file with the court of appeals a no-merit report. The no-merit report shall identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit. The no-merit report shall comply with the form requirements of s. 809.19 (8) (b) and (bm). The no-merit report shall not exceed 50 pages if a monospaced font or handwriting is used, or 13,000 words if a proportional serif font is used. The no-merit report shall be submitted with a signed certification setting forth the word count or page count of the report.

(b) *Counseling and notification*. 1. Prior to the filing of a no-merit report, the attorney shall discuss with the person all potential issues identified by the attorney and the person, and the merit of an appeal on these issues. The attorney shall inform the person that he or she has 3 options:

a. To have the attorney file a no-merit report;

b. To have the attorney close the file without an appeal; or

c. To have the attorney close the file and to proceed without an attorney or with another attorney retained at the person's expense.

2. The attorney shall inform the person that a no-merit report will be filed if the person either requests a no-merit report or does not consent to have the attorney close the file without further representation by the attorney. The attorney shall inform the person that if a no-merit report is filed the attorney will serve a copy of the transcripts and the circuit court case record upon the person at the person's request. The attorney shall inform the person that, if the person chooses to proceed with an appeal or chooses to have the attorney close the file without an appeal, the attorney will forward the attorney's copies of the transcripts and circuit court case record to the person at the person's request. The attorney shall also inform the person that the person may file a response to the no-merit report and that the attorney may file a supplemental no-merit report and affidavit or affidavits containing facts outside the record, possibly including confidential information, to rebut allegations made in the person's response to the no-merit report.

(c) *Certification by attorney*. The attorney shall include with the no-merit report a signed certification that the attorney has complied with the length requirement of par. (a) and the client-counseling and client-notification requirements of par. (b). Certification of a brief under par. (a) and certification of client counseling and client notification under par. (b) may be combined in a single document for signature. The certification may be electronically signed by the attorney in accordance with s. 809.801 (12) (a). The certification shall be in the following form:

CERTIFICATION BY ATTORNEY

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that the client must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if the client either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at the client's request. I have also informed my client that the client may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

I further certify that this no-merit report conforms to the length limit set out in s. 809.32 (1) (a). The length of this report is .... [pages] [words].

Signed …..

Signature

(d) *Service of copy of no-merit report, transcript, and circuit court case record*. The attorney shall serve a copy of the no-merit report on the person and shall file a statement in the court of appeals that service has been made upon the person. The attorney shall also serve upon the person a copy of the transcript and circuit court case record within 5 days after receipt of a request for the transcript and circuit court case record from the person and shall file a statement in the court of appeals that service has been made on the person.

(e) *Response to no-merit report*. The person may file a response to the no-merit report within 30 days after service of the no-merit report. The response shall not exceed 50 pages if a monospaced font or handwriting is used, or 13,000 words if a proportional serif font is used. If the response is handwritten, the text must be legibly printed and not include cursive writing or script, except for the person's signature. The response shall comply with the form requirements of s. 809.19 (8) (b) and (bm). If the person files a response, the attorney who filed the no-merit report shall receive a copy of the response through the electronic filing system.

(f) *Supplemental no-merit report*. If the attorney is aware of facts outside the record that rebut allegations made in the person's response, the attorney may file, within 30 days of the person's response, a supplemental no-merit report and an affidavit or affidavits, including matters outside the record. The supplemental report and affidavit or affidavits shall be served on the person, and the attorney shall file a statement in the court of appeals that service has been made upon the person.

(g) *Remand for fact-finding prior to decision*. If the person and the attorney allege disputed facts regarding matters outside the record, and if the court determines that the person's version of the facts, if true, would make resolution of the appeal under sub. (3) inappropriate, the court shall remand the case to the circuit court for an evidentiary hearing and fact-finding on those disputed facts before proceeding to a decision under sub. (3).

(2) NOTICE OF APPEAL, STATEMENT ON TRANSCRIPT, SERVICE OF COPIES. (a) The attorney also shall file in circuit court a notice of appeal of the judgment of conviction or final adjudication and of any order denying a postconviction or postdisposition motion. The notice of appeal shall be identified as a no-merit notice of appeal and shall state the date on which the no-merit notice of appeal is due and whether the due date is calculated under subd. 1. or 2. The clerk of circuit court shall transmit the record in the case to the court pursuant to s. 809.15. With the no-merit notice of appeal, the attorney also shall file in the circuit court a statement on transcript complying with the requirements of s. 809.11 (4), except that copies of the transcript need not be provided to other parties. All documents filed with the court under this subsection, except the transcript, shall be served on the state in accordance with s. 809.802 and on any other party. The no-merit notice of appeal and statement on transcript must be filed within whichever of the following is later:

1. One hundred eighty days after the service upon the person of the transcript and circuit court case record requested under s. 809.30 (2) (e).
2. Sixty days after the entry of the order determining a postconviction or postdisposition motion.

(b) The clerk of circuit court shall transmit the no-merit notice of appeal and the statement on transcript to the court of appeals within 3 days of filing. The clerk of the court of appeals shall docket the no-merit appeal upon receipt. The clerk shall assign a case number, create a notice that the case has been docketed, and transmit the notice to the clerk of circuit court.

(c) For electronic filing users in the circuit court case, receipt of the no-merit notice of appeal and statement on transcript through the circuit court electronic filing system shall constitute service of the documents. Receipt of the notice of docketing shall constitute service and notification that the no-merit appeal has been commenced in the court of appeals. Where service on the attorney general is required by s. 809.802 (1), service shall be made as provided in s. 809.802 (2). The clerk of the court of appeals shall serve the notice of docketing on paper parties by traditional means.

(d) The no-merit report shall be filed in the court of appeals within 14 days after the date on which the record is filed in the office of the clerk of the court of appeals. Service on electronic users shall be through the appellate electronic filing system. The attorney shall serve the no-merit report on paper parties by traditional means.

(3) DECISION ON NO-MERIT REPORT. In the event that the court of appeals determines that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction or final adjudication and the denial of any postconviction or postdisposition motion and relieve the attorney of further responsibility in the case. The attorney shall advise the person of the right to file a petition for review to the supreme court under s. 809.62.

(4) No-merit petition for review. (a) *Petition and supplemental petition*. If a fully briefed appeal is taken to the court of appeals and the attorney is of the opinion that a petition for review in the supreme court under s. 809.62 would be frivolous and without any arguable merit, the attorney shall advise the person of the reasons for this opinion and that the person has the right to file a petition for review. If requested by the person, the attorney shall file a petition satisfying the requirements of s. 809.62 (2) (d) and (f), and the person shall file a supplemental petition satisfying the requirements of s. 809.62 (2) (a), (b), (c), and (e). The person's supplemental petition shall not exceed 35 pages if a monospaced font or handwriting is used, or 8,000 words if a proportional serif font is used.

(b) *Time limit*. Except as provided in sub. (5) and s. 808.10, the petition and supplemental petition shall both be filed within 30 days after the date of the decision or order of the court of appeals.

(c) *Responses time limit*. Except as provided in sub. (5), an opposing party may file a response to the petition and supplemental petition as provided in s. 809.62 (3) within 14 days after the service of the supplemental petition.

(5) No-merit petition for review; effect of motion for reconsideration. (a) *Petition*. If a motion for reconsideration has been timely filed in the court of appeals under s. 809.24 (1), no party may file a petition or a supplemental petition in the supreme court until after the court of appeals issues an order denying the motion for reconsideration or an amended decision.

(b) *Supplemental petition*. If a motion for reconsideration in the court of appeals under s. 809.24 (1) is denied and a petition for review was filed before the motion for reconsideration was filed, and if the time for filing a supplemental petition under this subsection had not expired when the motion for reconsideration was filed, the supplemental petition may be filed within 14 days after the filing of the order denying the motion for reconsideration or within the time remaining to file the supplemental petition at the time that the motion for reconsideration was filed, whichever is greater.

(c) *Notice affirming, withdrawing, or amending pending petition or supplemental petition*. If the court of appeals files an amended decision in response to the motion for reconsideration under s. 809.24 (1), any party who filed a petition for review or a supplemental petition for review under this section prior to the filing of the motion for reconsideration must file with the clerk of the supreme court a notice affirming the pending petition or supplemental petition, a notice withdrawing the pending petition or supplemental petition, or an amendment to the pending petition or supplemental petition within 14 days after the date of the filing of the court of appeals' amended decision.

(d) *Responses*. If a motion for reconsideration is denied and a petition for review or a supplemental petition had been filed before the motion for reconsideration was filed, and if the time for filing a response to the petition or supplemental petition had not expired when the motion for reconsideration was filed, a response to the petition or the supplemental petition may be filed within 14 days of the order denying the motion for reconsideration. If a supplemental petition is filed under par. (b), the responding party may file a response to the supplemental petition within 14 days after service of the supplemental petition. After the petitioning party files the notice affirming or withdrawing the pending petition or supplemental petition or an amendment to the pending petition or supplemental petition under par. (c), the responding party must file a response to the notice or amendment within 14 days after service of the notice or amendment. The response to the notice or amendment may be an affirmation of the responding party's earlier response or a new response.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 390 s. 252; 1983 a. 192; Sup. Ct. Order, 123 Wis. 2d xix (1985); 1987 a. 403 s. 256; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; Sup. Ct. Order No. 04-08, 2008 WI 108, filed 7-30-08, eff. 1-1-09; Sup. Ct. Order No. 08-15 and Sup. Ct. Order No. 08-18, 2009 WI 4, 311 Wis. 2d xxix; 2009 a. 25; 2017 a. 365; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1981: Subs. (3) and (4) are amended to refer properly to the petition for supreme court review of decisions of the court of appeals.

Sub. (4) is amended to reflect the amendments to Rule 809.62 regulating the form, contents and length of a petition for review. If requested by the defendant, the attorney shall file with the supreme court a petition for review containing the statement of the case and the appendix required by Rule 809.62 (2) (d) and (f), as the attorney is in the best position to formulate the statement of the case and to provide the documents required for the appendix. The defendant shall file a supplement containing the statement of the issues presented for review, the table of contents, the statement of the criteria relied upon for a review and the argument amplifying the reasons relied on to support the petition as required by Rule 809.62 (2) (a), (b), (c) and (e). The rule does not prohibit the defendant from including a supplement to the statement of the case provided by the attorney.

The rule requires that both the petition and supplemental petition be filed within 30 days of the date of the decision of the court of appeals. As with all petitions for review, the opposing party may file a response to the petition and supplemental petition within 10 days. The amendment provides that the 10 days begins to run from the service of the supplemental petition. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: Titles and subtitles were added. Subsection (1) was subdivided into paragraphs (1) (a) through (g).

Subsection (1) (a) was amended to specify that the no-merit procedure applies only to direct appeals and that no-merit reports should be filed only when the defendant requests submission of a no-merit report or does not consent to closing the file without further representation by the appointed attorney.

Subsection (1) (b) creates new counseling and notification requirements for appointed attorneys. Before filing a no-merit report, the appointed attorney must discuss each identified issue with the defendant and explain why the issue lacks arguable merit. The attorney must inform the defendant of the defendant's options: file a no-merit report, close the file without filing an appeal or a no-merit report, or file an appeal without the assistance of appointed counsel. The attorney must inform the defendant that a no-merit report will be filed if the defendant requests submission of a no-merit report or if the defendant does not consent to closing the file without further representation by the appointed attorney. The attorney must inform the defendant that, if a no-merit report is submitted, the attorney will furnish copies of the transcript and circuit court case record to the defendant upon request. The attorney must notify the defendant that, if a no-merit report will not be submitted, the attorney will forward the attorney's copies of the transcript and circuit court case record to the defendant upon request. The attorney must also advise the defendant of the no-merit procedures set forth in this section, including the defendant's right to file a response to the attorney's no-merit report, and the attorney's right to file a supplemental no-merit report and affidavit containing facts outside the record, possibly including confidential information, to rebut allegations made in the defendant's response to the no-merit report.

Subsection (1) (c) creates a new certification rule that requires the appointed attorney to certify that the attorney has complied with the counseling and notification requirements of sub. (1) (b).

Subsection (1) (d) contains the no-merit report service rule from former sub. (1) (a) and creates a new transcript and circuit court case record service rule. The attorney must serve a copy of the no-merit report on the defendant. If the defendant requests a copy of the transcript and circuit court case record, the attorney must forward the copies within 14 days after receipt of the defendant's request. The attorney must file a statement in the court of appeals that service has been made on the defendant.

Subsection (1) (e) contains the response to the no-merit report rule from former sub. (1) (a). Subsection (1) (e) also creates a new rule that requires the clerk of the court of appeals to send a copy of the defendant's response to the no-merit report, within 5 days of the filing of the response, to the attorney who filed the no-merit report.

Subsection (1) (f) was created to allow the attorney to reply to the defendant's response to a no-merit report. The rule allows the attorney to file a supplemental no-merit report and affidavit(s) disclosing information that is outside the record and relevant to the attorney's no-merit determination without violating confidentiality rules. The supplemental report and affidavit procedure is in accordance with SCR 20:1.6 (c) (1), which allows disclosures of otherwise confidential communications "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used;" SCR 20:1.6 (c) (2), which allows disclosures "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client … or to respond to allegations in any proceeding concerning the lawyer's representation of the client;" and SCR 20:3.3, which requires candor toward the tribunal.

Subsection (1) (g) creates a new rule that requires fact-finding upon a remand to the circuit court if the defendant's response to the no-merit report and the attorney's supplemental no-merit report and affidavit allege facts outside the record; and if the facts alleged by the defendant, if true, would make resolution of the appeal under sub. (3) inappropriate.

The second sentence in sub. (2) requires the attorney to state, in the no-merit notice of appeal, of the time limit for filing the no-merit report and the calculation used to determine that time limit. The fourth sentence in sub. (2) requires the attorney to file a statement on transcript with the clerk, but exempts counsel from serving a transcript on other parties. The fifth sentence in sub. (2) requires counsel to serve copies of all other papers on the state.

Subsection (2) (a) establishes the time limits if a no-merit report is not preceded by a postconviction motion. The cross-reference was changed from s. 809.30 (2) (g) to (e) because only the original transcript and circuit court case record request triggers the 180-day time limit.

Subsection (2) (b) establishes the time limits if a no-merit report follows a postconviction motion.

The 10-day time limit in sub. (4) was changed to 14 days. Please see the comment to s. 808.07. [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: When a no-merit report is filed, s. 809.32 (1) (e) gives the person 30 days after the service of the no-merit report to file a response. The time limit in sub. (1) (d) is amended to adjust the time within which the attorney must send copies of the transcript and circuit court case record because five days should be sufficient time for the attorney to make copies and send them to the person. The amendment is intended to avoid delay that may occur if the person is not served with the record in time to utilize it in preparing a response to the no-merit report. [Re Order No. 02-01 effective January 1, 2003]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Page limits are added for the no-merit report, the response to the no-merit report, and the supplemental no-merit petition for review. In sub. (1) (e), adding a page limit for the response to the no-merit report is intended to improve counsel's ability to file a supplemental no-merit report within the required 30-day time limit. The page limit is equal to the page limit for a brief in chief to allow full discussion of all potential issues.

Sub. (2) (b) and (c) provide for electronic filing, transmission, and service of documents under this section consistent with ss. 809.10 and 809.11.

Sub. (2) (d) separates the due date of the no-merit notice of appeal and statement on transcript from the due date for no-merit report. This will facilitate the use of proper record citations in the no-merit report and avoid the need for motions for extension.

This rule is constitutional although it does not secure an indigent convict the right to counsel in preparing a petition for review. State v. Mosley, 102 Wis. 2d 636, 307 N.W.2d 200 (1981).

The "no-merit brief" requirement under sub. (1) does not deny the right to counsel. State ex rel. McCoy v. Appeals Ct., 137 Wis. 2d 90, 403 N.W.2d 449 (1987).

Appellate counsel's closing of a file because of no merit, without the defendant knowing of the right to disagree and compel a no merit report, is ineffective assistance of counsel. A defendant must be informed of the right to appeal and to a no merit report, but need not be informed orally. State ex rel. Flores v. State, 183 Wis. 2d 587, 516 N.W.2d 362 (1994).

The no merit appeal procedure does not apply to appeals regarding terminations of parental rights under s. 809.107. Gloria A. v. State, 195 Wis. 2d 268, 536 N.W.2d 396 (Ct. App. 1995), 95-0315.

Together, sub. (4) and s. 977.05 (4) (j) create a statutory, but not constitutional, right to counsel in petitions for review, provided counsel does not determine the appeal to be without merit. If counsel fails to timely file a petition for review, the defendant may petition for a writ of habeas corpus and the supreme court has the power to allow late filing. Schmelzer v. Murphy, 201 Wis. 2d 246, 548 N.W.2d 45 (1996), 95-1096.

When a defendant's postconviction issues have been addressed by the no merit procedure under this section, the defendant may not again raise those issues or other issues that could have been raised in a previous postconviction motion under s. 974.06, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously. State v. Tillman, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, 04-0966.

A convicted defendant could not be faulted for his reliance on his appellate counsel's assertion in the no-merit report that there were no issues of arguable merit when there was a potential appellate issue that was also not identified by appellate court review. In that case the defendant had shown a sufficient reason for failing to raise the issue in a response to the no-merit report and was not procedurally barred from raising the issue of a sentence being illegally increased. State v. Fortier, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, 04-3189.

A defendant's constitutional right to effective representation for the purpose of exercising the right to directly appeal a conviction did not require postconviction counsel to offer the defendant the option of a "partial no-merit" report on any potential issues remaining after the defendant declined for strategic reasons to pursue an issue having arguable merit. The U.S. Constitution requires only that "an indigent's appeal will be resolved in a way that is related to the merit of that appeal." Ford v. Holm, 2006 WI App 176, 296 Wis. 2d 119, 722 N.W.2d 609, 02-1828.

A defendant is not required to file a response to the no-merit report, but the fact that a defendant does not file a response to a no-merit report is not, by itself, a sufficient reason to permit the defendant to raise new claims under s. 974.06. Defendants must show a sufficient reason for failing to raise an issue in a response to a no-merit report because the court will have performed an examination of the record and determined any issues noted or any issues that are apparent to be without arguable merit. State v. Allen, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, 07-0795.

A defendant gets review of issues not raised only if the court of appeals follows the no-merit protocol. If the no-merit procedure was followed, then it is irrelevant whether the defendant raised his or her claims. He or she got review of those claims from the court of appeals and is barred from raising them again. If it was not followed, it is similarly irrelevant whether the claims were raised. The failure to raise them may or may not have contributed to the court of appeals' failure to identify issues of arguable merit, but the court of appeals and appellate counsel should have found them and the defendant may not be barred from bringing a motion under s. 974.06 if the no-merit procedure was not followed. State v. Allen, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, 07-0795.

If the court of appeals fails to discuss an issue of actual or arguable merit, the defendant has the opportunity to file: 1) a motion for reconsideration of the decision under sub. (1); 2) a petition for review with the supreme court; or 3) an immediate s. 974.06 motion, identifying any issue of arguable merit that was overlooked and, in the latter instance, explaining why nothing was said in a response to the no-

merit report. Delay in these circumstances can seldom be justified. Failure of a defendant to respond to both a no-merit report and the decision on the no-merit report firms up the case for forfeiture of any issue that could have been raised. State v. Allen, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, 07-0795.

This section comports with constitutional requirements. McCoy v. Court of Appeals, 486 U.S. 429 (1988).

SUBCHAPTER IV

APPEAL PROCEDURE IN COURT OF APPEALS
IN TERMINATION OF PARENTAL RIGHTS,
CH. 799, TRAFFIC REGULATION,
MUNICIPAL ORDINANCE VIOLATION, AND
PARENTAL CONSENT TO ABORTION CASES

809.40 Rule (Appeals in termination of parental rights, ch. 799, traffic regulation, municipal ordinance violation, and parental consent to abortion cases). (1m) An appeal from an order denying a petition under s. 48.375 (7) is governed by the procedures specified in s. 809.105, and an appeal from an order or judgment under s. 48.43 is governed by the procedures specified in s. 809.107.

(2) An appeal to the court of appeals from a judgment or order in a ch. 799, traffic regulation or municipal ordinance violation case must be initiated within the time period specified in s. 808.04, and is governed by the procedures specified in ss. 809.01 to 809.26 and 809.50 to 809.85, unless a different procedure is expressly provided in ss. 809.41 to 809.42.

(3) Any civil appeal to the court of appeals under sub. (2) is subject to the docketing statement requirement of s. 809.10 (1) (d) and may be eligible for the expedited appeals program in the discretion of the court.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1979 c. 32 s. 92 (16); Sup. Ct. Order, 92 Wis. 2d xiii (1979); 1979 c. 175 s. 53; 1979 c. 355; 1981 c. 390 s. 252; Sup. Ct. Order, 130 Wis. 2d xi xix (1986); Sup. Ct. Order, 131 Wis. 2d xv (1986); Sup. Ct. Order, 136 Wis. 2d xxv (1987); 1991 a. 263; 1993 a. 395; 1995 a. 77; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: Rule 809.40 establishes the time periods for appealing in a misdemeanor case or Chapter 48, 51 or 55 case or seeking postconviction relief in a misdemeanor case pursuant to s. 974.02 (1). It also makes the procedures set forth in Rules 809.30 to 809.32 apply to these types of cases.

Rules 809.41 to 809.43 establish special procedures for appeals that may be heard by one appellate judge. The appeal time periods in Chapter 299, traffic regulation and municipal ordinance violation cases, are found in s. 808.04. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (2) is repealed and recreated to place into it for purposes of clarity the appropriate reference in Chapter 808 containing the appeal time periods for Chapter 799, traffic regulations, and municipal ordinance violations cases. No substantive change is intended. [Re Order effective Jan. 1, 1980]

Judicial Council Note, 2002: Sub. (1) is repealed to eliminate confusing cross-references to appeal procedures under Subchapter III. Appeals under former sub. (1) were and are governed by the procedures in ss. 809.30 to 809.32. [Re Order No. 02-01 effective January 1, 2003.]

809.41 Rule (Motion for 3-judge panel or hearing in county of origin). (1) MOTION FOR 3-JUDGE PANEL. (a) If an appellant desires the matter to be decided by a 3-judge panel, the appellant shall file a motion for a 3-judge panel with the notice of appeal required by s. 809.10 (1) (a). Service of the appellant's motion shall be as provided by s. 809.10 (1) (h).

(b) If a petitioner requesting the court of appeals to exercise its supervisory jurisdiction or its original jurisdiction to issue prerogative writs desires the matter to be decided by a 3-judge panel, the petitioner shall file a motion for a 3-judge panel in the court of appeals with the petition requesting the court to exercise its supervisory or original jurisdiction. Service of the petitioner's motion shall be provided by traditional methods.

(c) If a petitioner requesting the court of appeals to exercise its appellate jurisdiction to grant petitions for leave to appeal desires the matter to be decided by a 3-judge panel, the petitioner shall file a motion for a 3-judge panel in the court of appeals with the petition for leave to appeal. Service of the petitioner's motion shall be as provided in s. 809.50 (1).

(d) If any other party desires the matter to be decided by a 3-judge panel, the party must file in the court of appeals a motion under this rule for a 3-judge panel within 14 days after service of the notice of appeal or with the response to the petition.

(e) The failure to file a motion under this section waives the right to request the matter to be decided by a 3-judge panel.

(f) A motion for a 3-judge panel in a case in which the state is a party shall also be served upon the attorney general. If the motion is filed with a petition for leave to appeal, service on the attorney general shall be provided as in s. 809.50 (1m). The attorney general may file a response to the motion within 11 days after service.

(2) DECISION ON MOTION FOR 3-JUDGE PANEL. The chief judge may change or modify his or her decision on a motion that the matter be decided by a 3-judge panel at any time prior to a decision on the merits of the appeal or petition.

(3) THREE-JUDGE PANEL ON COURT'S OWN MOTION. Whether or not a motion for a 3-judge panel has been filed, the chief judge may order that an appeal or petition be decided by a 3-judge panel at any time prior to a decision on the merits of the appeal or petition.

(4) MOTION FOR HEARING IN COUNTY OF ORIGIN. If an appellant desires that the appeal be heard in the county where the case or action originated under s. 752.31 (3), the appellant shall file in the circuit court, with the notice of appeal required by s. 809.10 (1) (a), a motion requesting a hearing in the county of origin. Service of the appellant's motion shall be as provided in s. 809.10 (1) (h). If any other party desires the matter to be heard in the county of origin, the party must

file in the court of appeals a motion within 14 days after service of the notice of appeal. The failure to file a motion under this subsection waives the right to request the appeal be heard in the county where the case or action originated.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); Sup. Ct. Order, 104 Wis. 2d xi (1981); Sup. Ct. Order 151 Wis. 2d xvii (1989); 1993 a. 486; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1979: Sub. (3) is created to clarify that the chief judge of the Court of Appeals has the authority to order that an appeal be decided by a 3-judge panel after it has initially been assigned to a single Court of Appeals judge. This authority of the chief judge may be exercised at any time prior to a decision on the merits of the appeal by the single Court of Appeals judge to whom the appeal was originally assigned. [Re Order effective Jan. 1, 1980]

Judicial Council Committee's Note, 1981: Rule 809.41 is amended to harmonize with ch. 192, Laws of 1979.

Sub. (1) is amended to apply the procedure for requesting a 3-judge panel for appeals to other proceedings in the types of case specified in s. 752.31 (2). The rule is also amended to require that if the motion for 3-judge panel is in a case in which the state is a party the motion must be served upon the attorney general as well as all persons of record. If the district attorney files the motion for 3-judge panel, the district attorney must serve the motion on the attorney general. The attorney general is given 7 days to respond to the motion.

The rule is further amended to require that the motion for 3-judge panel be filed with the copy of the notice of appeal required to be sent to the clerk of the court of appeals under Rule 809.10 (1) (a) and not with the original notice of appeal filed with the clerk of the circuit court.

Subs. (2) and (3) are amended to clarify that their provisions may apply to both an appeal and a petition requesting the exercise of supervisory jurisdiction or original jurisdiction to issue a prerogative writ.

Section 752.31, as amended by ch. 192, Laws of 1979, provides for a hearing in the county of origin for appeals but not for other proceedings such as a petition for supervisory writ or original jurisdiction prerogative writ. Sub. (4) is created to set out in a separate subsection of Rule 809.41 the procedure to request that an appeal be heard in the county where a case or action originated as authorized under sub. 752.31 (3). The creation of this separate subsection makes no substantive change in the prior procedure that was contained in Rule 809.41 (1). The rule requires that the motion for hearing in county of origin be filed with the copy of the notice of appeal required to be sent to the clerk of the court of appeals under Rule 809.10 (1) (a).

Rule 809.41 is also amended to clarify that the appeal or petition is decided rather than heard, as oral argument may not occur in all matters filed in the court of appeals. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: Titles were added. The time limits in sub. (1) and sub. (4) have been changed from 7 to 11 and 10 to 14 days. See the comment to s. 808.07. [Re Order No. 00-02 effective July 1, 2001]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: The motions addressed by this section may accompany direct appeals, petitions for leave to appeal, petitions for writs, or original jurisdiction matters. This section provides that motions in appeals and leave to appeal proceedings will be electronically served, while supervisory writs and original jurisdiction proceedings will use traditional service. This section is reorganized to reflect the different modes of service.

809.42 Rule (Waiver of oral argument). The appellant and respondent in an appeal under s. 752.31 (2) may waive oral argument, subject to approval of the court.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979).

Judicial Council Committee's Note, 1979: This rule is amended to delete language authorizing an appellant and respondent to waive the filing of briefs in an appeal to the Court of Appeals. The Court of Appeals as a consistent policy does not allow the waiving of filing of briefs. The rule is brought into conformity with that policy. [Re Order effective Jan. 1, 1980]

SUBCHAPTER V

DISCRETIONARY JURISDICTION PROCEDURE IN COURT OF APPEALS

809.50 Rule (Appeal from judgment or order not appealable as of right). (1) A person shall seek leave of the court to appeal a judgment or order not appealable as of right under s. 808.03 (1) by filing with the court of appeals within 14 days after the entry of the judgment or order a petition and supporting memorandum, if any. The petition and memorandum combined may not exceed 35 pages if a monospaced font or handwriting is used or 8,000 words if a proportional serif font is used. The petition shall contain:

(a) A statement of the issues presented by the controversy;

(b) A statement of the facts necessary to an understanding of the issues;

(c) A statement showing that review of the judgment or order immediately rather than on an appeal from the final judgment in the case or proceeding will materially advance the termination of the litigation or clarify further proceedings therein, protect a party from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice; and

(d) A copy of the judgment or order sought to be reviewed.

(1m) The clerk of the court of appeals shall docket the petition upon receipt of the items referred to under sub. (1). The clerk shall assign a case number, create a notice that the petition has been docketed, and transmit the notice and petition to the clerk of the circuit court. For electronic filing users in the circuit court case, receipt of the notice of docketing and the petition through the circuit court electronic filing system provides access to the appellate proceeding and constitutes service of the petition. Where service on the attorney general is required by s. 809.802 (1), service shall be made as provided in s. 809.802 (2). The clerk shall serve the notice of docketing on paper parties by traditional methods. The petitioner shall serve the petition on paper parties by traditional methods.

(2) An opposing party in circuit court shall file a response with supporting memorandum, if any, within 14 days after the service of the petition. The response and memorandum combined may not exceed 35 pages if a monospaced font or handwriting is used, or 8,000 words if a proportional serif font is used. Costs and fees may be awarded against any party in a petition for leave to appeal proceeding.

(3) If the court grants leave to appeal, the procedures for appeals from final judgments are applicable to further proceedings in the appeal. The entry of the order granting leave to appeal has the effect of the filing of a notice of appeal. The court may specify the issue or issues that it will review in the appeal. If the court grants leave to appeal, the petitioner shall file a docketing statement in the court of appeals if required by s. 809.10 (1) (d), identifying the issues to be reviewed in the appeal. The docketing statement shall be filed within 11 days after the date of the order granting the petition for leave to appeal.

(4) A person filing a petition or response under this section shall file with the petition or response a certification setting forth the word count or page count of the document as provided in sub. (1) or (2).

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); Sup. Ct. Order, 151 Wis. 2d xvii (1989); Sup. Ct. Order, 164 Wis. 2d xxix (1991); Sup. Ct. Order, 171 Wis. 2d xxxv (1992); Sup. Ct. Order No. 93-20, 179 Wis. 2d xxv; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: Section 808.03 (1) makes only final judgments and final orders appealable as of right. All other judgments and orders are appealable only in the discretion of the court. This section provides the procedure for asking the court to permit the appeal of a nonfinal order. The issue of whether the court should hear the appeal is presented to the court by petition with both parties given the opportunity of submitting memoranda on the question. The standards on which nonfinal judgments or orders should be reviewed immediately are set forth in s. 808.03 (2) and are taken from the American Bar Association's Standards of Judicial Administration, Standards Relating to Appellate Courts, s. 3.12 (b). [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1979: Sub. (1) (c) is amended to conform with 808.03 (2) (b), which sets out the standards created by the Wisconsin Legislature for appeals to the Court of Appeals by permission. A drafting error in the original preparation of chapter 809 replaced the word "or" found in 808.03 (2) (b) with the word "and", which results in a party having to show in a petition to the Court of Appeals for the court to assume discretionary jurisdiction that granting such a petition will protect a party from both substantial "and" irreparable injury rather than meeting just one of the 2 criteria, as was the intention of the Wisconsin Legislature. [Re Order effective Jan. 1, 1980]

Judicial Council Note, 2001: The time limits in subs. (1) and (2) were changed from 10 to 14 days. Please see the comment to s. 808.07. Subsection (3) specifies that the court may grant discretionary review on specified issues. This rule codifies *Fedders v. American Family Mut. Ins. Co.*, 230 Wis. 2d 577, 601 N.W.2d 861 (Ct. App. 1999), 99-1526, which held a grant of leave to appeal from a nonfinal order or judgment does not authorize cross-appeals as of right from the same or from another nonfinal order or judgment; cross-appeals require a separate petition for leave to appeal. [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: Subsection (3) is amended to clarify the docketing statement requirements following the grant of a petition for leave to appeal a non-final order. [Re Order No. 02-01 effective January 1, 2003]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: A petition for leave to appeal may be filed in the court of appeals and served through the circuit court case in the same manner as a pre-appeal motion under s. 809.14 (5). Where the state needs to be added as a party, the attorney general is served through the appellate electronic filing system.

Once leave to appeal is granted, a cross-appeal from the same interlocutory order or judgment in the action requires a petition for leave to appeal. Fedders v. American Family Mutual Insurance Co. 230 Wis. 2d 577, 601 N.W.2d 861 (Ct. App. 1999), 99-1526.

A person who is granted leave to appeal a nonfinal order is limited solely to those issues outlined in the petition to the court of appeals. State v. Aufderhaar, 2004 WI App 208, 277 Wis. 2d 173, 689 N.W.2d 674, 03-2820. Reversed on other grounds. 2005 WI 108, 283 Wis. 2d 336, 700 N.W.2d 4, 03-2820.

Interlocutory Appeals in Wisconsin. Towers, Arnold, Tess-Mattner & Levenson. Wis. Law. July 1993.

809.51 Rule (Supervisory writ and original jurisdiction to issue prerogative writ). (1) A person may request the court to exercise its supervisory jurisdiction or its original jurisdiction to issue a prerogative writ over a court and the presiding judge, or other person or body, by filing a petition and supporting memorandum. The petition shall be served on each party and proposed respondent, and, if applicable, upon the originating court or tribunal, by traditional methods as provided in s. 809.80 (2). The petition and memorandum combined may not exceed 35 pages if a monospaced font or handwriting is used, or 8,000 words if a proportional serif font is used. The petitioner shall name as respondents the court and judge, or other person or body, and all other parties in the action or proceeding. The petition shall contain:

(a) A statement of the issues presented by the controversy;

(b) A statement of the facts necessary to an understanding of the issues;

(c) The relief sought; and

(d) The reasons why the court should take jurisdiction.

(1m) The clerk of the court of appeals shall docket the petition upon receipt of the items referred to in sub. (1). The clerk shall assign a case number, create a notice that the petition has been docketed, transmit the notice of docketing to the clerk of circuit court if applicable, and send the notice of docketing to the parties by traditional methods.

(2) The court may deny the petition ex parte or may order the respondents to file a response with a supporting memorandum, if any, and may order oral argument on the merits of the petition. The response and memorandum combined may not exceed 35 pages if a monospaced font or handwriting is used, or 8,000 words if a proportional serif font is used. The respondents shall respond with supporting memorandum within 14 days after service of the order. A respondent may file a letter stating that the respondent does not intend to file a response, but the petition is not thereby admitted.

(3) The court, upon a consideration of the petition, responses, supporting memoranda and argument, may grant or deny the petition or order such additional proceedings as it considers appropriate. Costs and fees may be awarded against any party in a writ proceeding.

(4) A person filing a petition or response under this section shall file with the petition or response a certification setting forth the word count or page count of the document as provided in sub. (1) or (2).

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 104 Wis. 2d xi (1981); Sup. Ct. Order, 151 Wis. 2d xix (1981); Sup. Ct. Order, 164 Wis. 2d xxix (1991); Sup. Ct. Order, 171 Wis. 2d xxxv (1992); Sup. Ct. Order No. 93-20, 179 Wis. 2d xxv (1993); Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1981: Sub. (1) is amended to reflect the procedure for issuance of a prerogative writ currently followed by the court of appeals and to alert attorneys to the correct procedure to be followed. Rule 809.51 governs the procedures for seeking a petition for supervisory writ or original jurisdiction prerogative writ in the court of appeals. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: The time limit in sub. (2) was changed from 10 to 14 days. See the comment to s. 808.07. [Re Order No. 00-02 effective July 1, 2001]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Unlike an appeal from a circuit court proceeding, writs and original actions do not necessarily arise from a pending case through which the parties can be served electronically. A proceeding under this section is a new action that must be served on the respondents by traditional methods.

The court of appeals abused its discretion by ordering oral argument one day after the petition for a writ was filed and served. State ex rel. Breier v. Milwaukee County Circuit Court, 91 Wis. 2d 833, 284 N.W.2d 102 (1979).

The court of appeals does not have jurisdiction to entertain original actions unrelated to its supervisory or appellate authority over circuit courts. State ex rel. Swan v. Elections Board, 133 Wis. 2d 87, 394 N.W.2d 732 (1986).

The term "supervisory writ" is both: 1) the general term used in petitioning the court of appeals to exercise its constitutional supervisory authority and in petitioning the supreme court to exercise its constitutional superintending authority; and 2) a new writ the supreme court devised independent of the traditional common law writs. State ex rel. CityDeck Landing LLC v. Circuit Court for Brown County, 2019 WI 15, 385 Wis. 2d 516, 922 N.W.2d 832, 18-0291.

Neither this section nor equity imposes a prompt and speedy pleading requirement in the filing of a petition for habeas corpus. The equitable defense of laches exists to address any prejudice to the state caused by a petitioner's unreasonable delay in the filing of a habeas petition. A habeas petition may not be denied ex parte solely because the petitioner failed to assert and demonstrate the petitioner sought relief in a prompt and speedy manner. State ex rel. Lopez-Quintero v. Dittmann, 2019 WI 58, 387 Wis. 2d 50, 928 N.W.2d 480, 18-0203.

809.52 Rule (Temporary relief). A petitioner may request in a petition filed under s. 809.50 or 809.51 that the court grant temporary relief pending disposition of the petition. The court or a judge of the court may grant temporary relief upon the terms and conditions it considers appropriate.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1981 c. 390 s. 252.

Judicial Council Committee's Note, 1978: Rules 809.51 to 809.52 incorporate into the rules for the first time the procedures to be followed when the court is asked to exercise its supervisory jurisdiction. For an excellent discussion of original and supervisory jurisdiction of the Supreme Court and the distinction between them see the opinion by Justice Wickhem in Petition of Heil, 230 Wis. 428, 284 N.W. 42 (1939). To a large degree the procedures specified in 201 Wis. 123, 229 N.W. 643 (1930) are followed, but some of the features of Rule 21, FRAP, are included.

There are a number of changes, however, from prior procedures. The parties in the action or proceeding in the trial court must be made respondents in the Court of Appeals because they in most cases are the real parties in interest. Usually the judge whose order is being challenged has no direct interest in the outcome and should not be forced to appear but may, of course, do so. The Attorney General must also be served in certain cases such as declaratory judgments involving the constitutionality of a statute or arising under Chapter 227, the administrative procedure act.

The petition must be filed with the clerk rather than being submitted ex parte to a judge of the court. By virtue of the requirement that the petition be filed, it must previously have been served on opposing parties as required by s. 809.80. The initial action of the court will be to direct the respondents to answer the petition rather than to issue an order to show cause why the relief requested should not be granted. [Re Order effective July 1, 1978]

SUBCHAPTER VI

APPELLATE PROCEDURE IN SUPREME COURT

809.60 Rule (Petition to bypass). (1) (a) A party may file with the supreme court a petition to bypass the court of appeals pursuant to s. 808.05 no later than 14 days following the filing of the respondent's brief under s. 809.19 or response. The petition must include a statement of reasons for bypassing the court of appeals.

(b) The clerk shall docket the petition to bypass in the supreme court and notify the parties that the petition has been filed. For electronic filing users in the court of appeals proceeding, the notice of activity constitutes service of the petition and provides notification that the proceeding is pending before the supreme court. The clerk shall serve the notice of docketing on paper parties by traditional methods. The petitioner shall serve the petition for bypass on paper parties by traditional methods.

(2) An opposing party may file a response to the petition within 14 days after the service of the petition.

(3) The filing of the petition stays the court of appeals from taking under submission the appeal or other proceeding.

(4) The supreme court may grant the petition upon such conditions as it considers appropriate.

(5) Upon the denial of the petition by the supreme court the appeal or other proceeding in the court of appeals continues as though the petition had never been filed.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 104 Wis. 2d xi (1981); Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1981: The amendment to sub. (1) establishes time periods for filing a bypass petition to discourage use of the petition for dilatory purposes. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: The time limits in subs. (1) and (2) have been changed from 10 to 14 days. Please see the comment to s. 808.07. [Re Order No. 00-02 effective July 1, 2001]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Sub. (1) provides that when a petition to bypass is filed, electronic filing users will be served through the electronic filing system.

809.61 Rule (Bypass by certification of court of appeals or upon motion of supreme court). The supreme court may take jurisdiction of an appeal or other proceeding in the court of appeals upon certification by the court of appeals or upon the supreme court's own motion. The supreme court may refuse to take jurisdiction of an appeal or other proceeding certified to it by the court of appeals.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978).

The supreme court's denial of certification has no precedential value on the merits of the case. State v. Shillcutt, 119 Wis. 2d 788, 350 N.W.2d 686 (1984).

When confronted with a direct conflict between a decision of the state supreme court and a later decision of the U. S. Supreme Court on a matter of federal law, the court of appeals may certify the case to the state supreme court under this section. If it does not, or certification is not accepted, the supremacy clause of the U. S. Constitution compels adherence to U.S. Supreme Court precedent on matters of federal law, although it means deviating from a conflicting decision of the state supreme court. State v. Jennings, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142, 00-1680.

Discretionary review by the Wisconsin Supreme Court. Pokrass. WBB Mar. 1985.

809.62 Rule (Petition for review). (1g) DEFINITIONS. In this section:

(a) "Adverse decision" means a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court by any party seeking review.

(b) "Adverse decision" includes the court of appeals' denial of or failure to grant the full relief sought or the court of appeals' denial of the preferred form of relief.

(c) "Adverse decision" does not include a party's disagreement with the court of appeals' language or rationale in granting a party's requested relief.

(1m) GENERAL RULE; TIME LIMITS. (a) 1. A party may file with the supreme court a petition for review of an adverse decision of the court of appeals pursuant to s. 808.10. The clerk shall docket the petition for review in the supreme court and notify the parties that the petition has been filed.

2. For electronic filing users in the court of appeals proceeding, the notice of activity constitutes service of the petition and provides notification that the petition is pending before the supreme court. Where service on the attorney general is required by s. 809.802 (1), service shall be made as provided in s. 809.802 (2). The clerk shall serve the notice of docketing on paper parties by traditional methods. The petitioner shall serve the petition for review on paper parties by traditional methods.

(b) If a motion for reconsideration has been timely filed in the court of appeals under s. 809.24 (1), no party may file a petition for review in the supreme court until after the court of appeals issues an order denying the motion for reconsideration or an amended decision.

(c) If a motion for reconsideration is denied and a petition for review had been filed before the motion for reconsideration was filed, and if the time for filing a response to the petition had not expired when the motion for reconsideration was filed, a response to the petition may be filed within 14 days of the order denying the motion for reconsideration.

(d) If the court of appeals files an amended decision in response to the motion for reconsideration under s. 809.24 (1), any party who filed a petition for review prior to the filing of the motion for reconsideration must file with the clerk of the supreme court a notice affirming the pending petition, a notice withdrawing the pending petition, or an amendment to the pending petition within 14 days after the date of the filing of the court of appeals' amended decision.

(e) After the petitioning party files a notice affirming or withdrawing the pending petition or an amendment to the pending petition under par. (d), the responding party must file a response to the notice or amendment within 14 days after service of the notice or amendment. The response may be an affirmation of the responding party's earlier response or a new response.

(1r) CRITERIA FOR GRANTING REVIEW. Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

(a) A real and significant question of federal or state constitutional law is presented.

(b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

(2) CONTENTS OF PETITION. Except as provided in s. 809.32 (4), the petition must contain:

(a) A statement of the issues the petitioner seeks to have reviewed, the method or manner of raising the issues in the court of appeals and how the court of appeals decided the issues. The statement of issues shall also identify any issues the petitioner seeks to have reviewed that were not decided by the court of appeals. The statement of an issue shall be deemed to comprise every subsidiary issue as determined by the court. If deemed appropriate by the supreme court, the matter may be remanded to the court of appeals.

(b) A table of contents.

(c) A concise statement of the criteria of sub. (1r) relied upon to support the petition, or in the absence of any of the criteria, a concise statement of other substantial and compelling reasons for review.

(d) A statement of the case containing a description of the nature of the case; the procedural status of the case leading up to the review; the dispositions in the circuit court and court of appeals; and a statement of those facts not included in the opinion of the court of appeals relevant to the issues presented for review, with appropriate citation to the record.

(e) An argument amplifying the reasons relied on to support the petition, arranged in the order of the statement of issues presented. All contentions in support of the petition must be set forth in the petition. A memorandum in support of the petition is not permitted.

(f) As a separate document, an appendix containing, in the following order, all of the following:

1. The decision and opinion of the court of appeals.

2. The judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition.

3. Any other portions of the record necessary for an understanding of the petition.

4. A copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b).

(2m) Inapplicable to parental consent to abortion cases. Subsection (2) does not apply to a petition for review of an appeal that is governed by s. 809.105. A petition governed by that section shall comply with s. 809.105 (11).

(2r) Application to termination of parental rights cases. This section applies to petitions for review of an appeal under s. 809.107, except as provided in s. 809.107 (6) (f).

(3) Response to petition. Except as provided in sub. (1m) and s. 809.32 (4) and (5), an opposing party may file a response to the petition within 14 days after the service of the petition. If an unpublished opinion is cited under s. 809.23 (3) (a) or (b), a copy of the opinion shall be provided in an appendix to the response. If filed, the response may contain any of the following:

(a) Any reasons for denying the petition.

(b) Any perceived defects that may prevent ruling on the merits of any issue in the petition.

(c) Any perceived misstatements of fact or law set forth in the petition that have a bearing on the question of what issues properly would be before the court if the petition were granted.

(d) Any alternative ground supporting the court of appeals result or a result less favorable to the opposing party than that granted by the court of appeals.

(e) Any other issues the court may need to decide if the petition is granted, in which case the statement shall indicate whether the other issues were raised before the court of appeals, the method or manner of raising the issues in the court of appeals, whether the court of appeals decided the issues, and how the court of appeals decided the issues.

(3m) Petition for cross-review. (a) *When required; time limit*. A party who seeks to reverse, vacate, or modify an adverse decision of the court of appeals shall file a petition for cross-review within the period for filing a petition for review with the supreme court, or 30 days after the filing of a petition for review by another party, whichever is later.

(b) *No cross-petition required*. 1. A petition for cross-review is not necessary to enable an opposing party to defend the court of appeals' ultimate result or outcome based on any ground, whether or not that ground was ruled upon by the lower courts, as long as the supreme court's acceptance of that ground would not change the result or outcome below.

2. A petition for cross-review is not necessary to enable an opposing party to assert grounds that establish the party's right to a result that is less favorable to it than the result or outcome rendered by the court of appeals but more favorable to it than the result or outcome that might be awarded to the petitioner.

(c) *Rights and obligations of parties*. A party seeking cross-review has the same rights and obligations as a party seeking review under ch. 809, and any party opposing a petition for cross-review has the same rights and obligations as a party opposing review.

(4) Form and length requirements. The petition for review and response, if any, shall conform to s. 809.19 (8) (b) and (bm) and (8g) as to form, pagination, and certification. The petition shall be as short as possible and may not exceed 35 pages in length if a monospaced font or handwriting is used, or 8,000 words if a proportional serif font is used, exclusive of appendix. The first page of the petition for review shall be a white cover page that includes the proper case caption, including the case number, and shall bear the title "Petition for Review." The first page of the response shall be a white cover page that includes the proper case caption, including the case number, and shall bear the title "Response to Petition for Review."

(4m) Combined response and petition for cross-review. When a party elects both to submit a response to the petition for review and to seek cross-review, the first page shall be a white cover page that includes the proper case caption and case number, and shall bear the title "Combined Response and Petition for Cross-Review." The time limits set forth in sub. (3m) shall apply. The response portion of the combined document shall comply with the requirements of subs. (3) and (4). The cross-review portion of the combined document shall comply with the requirements of subs. (2) and (4), except that the requirement of sub. (2) (d) may be omitted. The cross-review portion shall be preceded by a blank white cover. A signature shall be required only at the conclusion of the cross-review portion of the combined document.

(5) EFFECT ON COURT OF APPEALS PROCEEDINGS. Except as provided in s. 809.24, the filing of the petition stays further proceedings in the court of appeals.

(6) CONDITIONS OF GRANT OF REVIEW. The supreme court may grant the petition or the petition for cross-review or both upon such conditions as it considers appropriate, including the filing of additional briefs. If a petition or petition for cross-review is granted, the petitioner or cross-petitioner cannot raise or argue issues not set forth in the petition or petition for cross-review unless ordered otherwise by the supreme court. The supreme court may limit the issues to be considered on review. If the issues to be considered on review are limited by the supreme court and do not include an issue that was identified in a petition or petition for cross-review and that was left undecided by the court of appeals, the supreme court shall remand that issue to the court of appeals upon remittitur, unless that issue has become moot or would have no effect.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 92 Wis. 2d xiii (1979); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1991 a. 263; Sup. Ct. Order No. 93-20, 179 Wis. 2d xxv (1993); 1993 a. 395; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; Sup. Ct. Order No. 04-08, 2008 WI 108, filed 7-30-08, eff. 1-1-09; Sup. Ct. Order No. 08-15 and Sup. Ct. Order No. 08-18, 2009 WI 4, 311 Wis. 2d xxix; 2009 a. 25, 180; Sup. Ct. Order No. 10-01 and Sup. Ct. Order No. 10-02, 2010 WI 42, 323 Wis. 2d xxiii; 2017 a. 365; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21; 2021 a. 240 s. 30.

Judicial Council Committee's Note, 1979: The caption of Rule 809.62 is amended to more properly describe the function of the Supreme Court in reviewing decisions of the Court of Appeals.

Rule 809.62 (5) [7] is created to protect the review rights of all parties to a review in the Supreme Court by creating a cross-review provision for a decision being reviewed by the Supreme Court similar to the cross-appeal provision for a judgment or order being appealed to the Court of Appeals from a trial court found in Rule 809.10 (2) (b). New sub. 809.62 (5) gives a party the ability to file for cross-review with the Supreme Court up to an additional 30 days from the filing of a petition for review by another party to the decision rendered by the Court of Appeals. [Re Order effective Jan. 1, 1980]

Judicial Council Committee's Note, 1981: Rule 809.62 is amended to regulate the form, contents and length of petitions for review. The amendments are intended to focus the petition for review on the criteria promulgated by the supreme court for granting a petition for review, to facilitate the efficient and effective consideration of the petition by the supreme court, and to develop a petition that may be used by the supreme court for consideration of the merits after review is granted.

Sub. (1) incorporates criteria promulgated by the supreme court for granting a petition for review. In re Standards to Review Petitions to Appeal, 85 Wis. 2d xiii, 268 N.W.2d xxviii (1978).

Sub. (2) regulates the contents of the petition. Sub. (2) (a) requires that the petition contain a statement of the issues presented for review, the method or manner of raising the issues in the court of appeals, and how the court of appeals decided the issues. Correspondingly, sub. (6), formerly sub. (4), is amended to provide that if the petition is granted, the petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court. The supreme court may limit the issues to be considered on review. These amendments establish that the parties are limited to the issues raised in the petition, but the supreme court may order the parties to argue issues not raised. Likewise, the supreme court may limit the issues to be reviewed. The petition informs the supreme court as to whether an issue had been raised in the court of appeals. If an issue was not raised in the court of appeals, then it is left to the judicial discretion of the supreme court as to whether it will grant the petition so as to allow the issue to be raised in the supreme court.

Sub. (2) (c) requires that the petition contain a concise statement of the criteria of sub. (1) relied upon to support the petition, or in the absence of any of the criteria, a concise statement of other substantial and compelling reasons for review. Supreme court review is a matter of discretion. The supreme court has promulgated the criteria as guidelines for the exercise of its discretion. In the absence of one of the criteria, the supreme court may grant a petition for review if the petitioner establishes other substantial and compelling reasons for review. The amendment requires that the petitioner either state criteria relied upon or in the absence of any of the criteria, state other substantial and compelling reasons for review. The burden is on the petitioner to explicitly define the other substantial and compelling reasons for review.

Sub. (2) (d) requires that the petition contain a statement of the case containing a description of the nature of the case, the procedural status of the case leading up to the review, the dispositions in the trial court and court of appeals, and a statement of those facts not included in the opinion of the court of appeals relevant to the issues presented for review, with appropriate references to the record. The opinion of the court of appeals must be included in an appendix to the petition. Consequently, if the opinion of the court of appeals sets forth a complete statement of the facts relevant to the issues presented for review, the petition for review need not restate those facts. The petition need only state those facts not included in the opinion of the court of appeals relevant to the issues presented for review. The statement of facts must include appropriate references to the record.

Sub. (2) (e) provides that the petition must contain an argument amplifying the reasons relied on to support the petition, arranged in the order of the statement of issues presented. All contentions must be contained within the petition. There is no memorandum in support of the petition.

The appendix required by sub. (2) (f) will assure that all relevant supporting documents necessary for an understanding of the petition for review be before the supreme court for consideration. This will facilitate not only the review of the petition for review but will enhance the petition as an aid to the court in any subsequent review on the merits.

Sub. (4) is created to regulate the form and length of the petition for review and response. The form of the petition and response is based on Rule 809.19 for briefs as to printing requirements, page size and binding. The petition and response shall be as short as possible but shall not exceed 35 pages in length, exclusive of appendix.

Prior sub. (3) is renumbered sub. (5) and amended to allow the court of appeals to reconsider on its own motion a decision or opinion within 30 days of a filing of a petition for review.

The amendments to the rule refer to Rule 809.32 (4) which governs the filing of a petition for review in a criminal case where there has been a fully briefed appeal to the court of appeals and appointed counsel is of the opinion that a petition for review in the supreme court under Rule 809.62 would be frivolous and without any arguable merit.

Prior subs. (2) and (5), relating to the time for filing the response to the petition for review and the provisions for cross-review have been renumbered subs. (3) and (7), respectively, but have not been substantively altered. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: The time limit in sub. (3) has been changed from 10 to 14 days. Please see the comment to s. 808.07. The last sentence of sub. (4) specifies the color of the cover that should accompany a petition for review and the number of copies required. [Re Order No. 00-02 effective July 1, 2001]

NOTE: Sup. Ct. Order No. 04-08, 2008 WI 108, states, "The Judicial Council Committee Comments are not adopted, but will be published and may be consulted for guidance in interpreting and applying Wis. Stat. ss. 809.30, 809.32 and 809.62."

Judicial Council Committee Comments, July 2008: The definition in s. 809.62(1g) codifies the holding in *Neely v. State*, 89 Wis. 2d 755, 757–58, 279 N.W.2d 255 (1979), to the effect that a party cannot seek review of a favorable result merely because of disagreement with the court of appeals' rationale. At the same time, s. 809.62 (1g) underscores the fact that a court of appeals' decision that is generally favorable to a party remains adverse to that party to the extent that it does not grant the party all the relief requested, i.e., the full relief or the preferred form of relief sought by the party. See also *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

As an example, a criminal defendant seeking reversal of his conviction or, if that is not granted, resentencing, would be entitled to seek review of the court of appeals' failure to grant a new trial, even if it did order resentencing. Similarly, a civil appellant challenging a verdict finding liability and, should that be denied, the amount of damages, would be entitled to seek review of the court of appeals' failure to grant a new trial on liability, even if the court of appeals did order reassessment of damages.

Rules 809.62 (1m) and (1r) are former Rule 809.62 (1), divided into subsections and subtitled. Subtitles are added throughout Rule 809.62 to help practitioners and parties locate particular provisions.

Rule 809.62 (2) (a) is amended to require the petitioner to identify all issues on which it seeks review, including issues raised in the court of appeals but not decided in the court of appeals. The amendment to Rule 809.62 (2) (a) also clarifies that the statement of an issue incorporates all subsidiary issues. This amendment is adapted from the United States Supreme Court's rules. See U.S. Sup. Ct. Rule 14.1(a). See also *In the Interest of Jamie L.*, 172 Wis. 2d 218, 232-33, 493 N.W.2d 56 (1992).

Rule 809.62 (3) is amended to advise the respondent to apprise the supreme court, in the response to the petition, of any issues the court may need to decide if it grants review of the issue(s) identified in the petition. This applies whether or not the court of appeals actually decided the issues to be raised.

The amendments to Rule 809.62 (3) also advise the respondent to identify in its response any perceived misstatements of law or fact, or any defects (such as waiver, mootness, or estoppel) that could prevent the supreme court from reaching the merits of the issue presented in the petition. Compare U.S. Sup. Ct. Rule 15.2.

Rule 809.62 (3) (d) addresses the circumstance in which the respondent asserts an alternative ground to defend the court of appeals' ultimate result or outcome, whether or not that ground was raised or ruled upon by the lower courts.

Rule 809.62 (3) (d) also addresses the circumstances in which the respondent asserts an alternative ground that would result in a judgment less favorable than that granted by the court of appeals but more favorable to the respondent than might be granted for the petitioner (e.g., remand for a new trial rather than a rendition of judgment for the petitioner). The language is modified from Tex. R. App. P. 53.3(c)(3).

Rule 809.62 (3) (d) and (e) are intended to facilitate the supreme court's assessment of the issues presented for review, not to change current law regarding the application of waiver principles to a respondent. See *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985) (An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court.)

Implicit in these amendments, although not expressly stated as in the federal rule, U.S. Sup. Ct. Rule 15.2, is the understanding that a respondent may be deemed to have waived issues or defects that do not go to jurisdiction if they are not called to the attention of the supreme court in a response to the petition. The supreme court retains its inherent authority to disregard any waiver and address the merits of an unpreserved argument or to engage in discretionary review under Wis. Stat. s. 751.06 or 752.35. See *State v. Mikrut*, 2004 WI 79, ¶38. The possible invocation of waiver for failure to raise such alleged defects in the response will encourage the respondent to inform the supreme court of such defects before the supreme court decides whether to expend scarce judicial resources on the case. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 815–16 (1985).

A number of other states have rules requiring the respondent to identify other issues it seeks to raise if review is granted, and either expressly or impliedly limiting the issues before the supreme court on a grant of review to those set forth in the petition and response. See Ariz. R. Civ. App. P. 23(e); Calif. App. R. 28(e)(2) & (5); Kan. R.S. & A. Cts. Rule 8.03(g)(1); N.C. R. App. P. 15(d) & 16(a); Oregon R. App. P. 9.20(2); Wash. R. App. 13.4(d).

A leading handbook on United States Supreme Court practice describes the procedure in that Court as follows:

> A respondent may also choose to waive the right to oppose a petition, which seems clearly without merit. This will save time and money, without any substantial risk if respondent feels certain that certiorari will be denied. In order that the waiver will clearly be understood as based upon the lack of merit in the petition, the statement filed with the Court — which may be in the form of a letter to the Clerk — should contain language to this effect: "In view of the fact that the case clearly does not warrant review by this Court [as is shown by the opinion below], respondent waives the right to file a brief in opposition." The letter may also request leave to file a response to the petition if the Court wishes to see one. This will seldom be necessary, since if the respondent has not filed a response, or has affirmatively waived the right to file, and if the Court believes that the petition may have some merit, the respondent will usually be requested to file a response — usually within 30 days from the request.
>
> In recent years, in order to expedite the filing of responses in the more meritorious cases, the Solicitor General has waived the right to file opposition briefs in many cases deemed to be frivolous or insubstantial. States often do the same thing, especially in criminal cases. Such waivers should be filed promptly, in order to speed up the distribution of the petition and the disposition of the case. Usually such petitions are denied, even though the Court may call for a response if any of the Justices so request.
>
> Stern, R., et al., *Supreme Court Practice* § 6.37 at 374–75 (7th ed. 1993) (footnote omitted).

Rule 809.62 (3m) is former Rule 809.62 (7) renumbered and amended. The requirements governing petitions for cross-review fit more logically after the requirements for the petition and the response, contained in Rules 809.62 (2) and (3).

Amended Rule 809.62 (3m) (a) replaces the permissive "may" with the mandatory "shall" to clarify that a petition for cross-review is mandatory if the respondent seeks to reverse, vacate, or modify an adverse decision of the court of appeals.

Amended Rule 809.62 (3m) also clarifies when a respondent must raise an issue in a petition for cross-review, rather than raising the issue in a response to the petition or merely arguing it in the brief. *Compare State v. Scheidell*, 227 Wis. 2d 285, 288 n.1, 595 N.W.2d 661 (1999) (respondent cannot argue issue raised below unless the issue was raised in a petition for cross-review), *with, e.g., In the Interest of Jamie L.*, 172 Wis. 2d 218, 232–33, 493 N.W.2d 56 (1992) (noting "general rule" that a petition for cross-review is not necessary to defend a judgment on any ground previously raised). Complicating these matters are holdings that a party may not petition for review (or cross-review) if it receives a favorable outcome from the court of appeals, *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

Rule 809.62 (3m) (b) clarifies that a respondent need not file a petition for cross-review to raise alternative issues or grounds in support of either (1) the court of appeals' ultimate result or (2) a judgment less favorable than that granted by the court of appeals but more favorable to the respondent than might be granted for the petitioner. Any such alternative grounds for affirmance or lesser relief should, however, be identified in the response. See Rules 809.62 (3) (d), (3) (e) and (6).

Amended Rule 809.62 (3m) (c) clarifies that a party opposing a petition for cross-review has the same rights and obligations as a respondent under Rule 809.62 (3).

New Rule 809.62 (4m) is created to permit a combined document when a party elects both to respond to the petition for review and to submit a petition for cross-review. The content and format requirements of the combined document are similar to the requirements for a combined brief of respondent and cross-appellant found in s. 809.19 (6) (b) 2.

The last sentence of Rule 809.62 (6) is new and is intended to preserve, for review by the court of appeals following remand, any issue raised at the court of appeals but not decided by that court or by the supreme court on review. For instance, after a civil jury verdict, an insured party might appeal issues relating to liability and damages. The insurer might appeal issues relating to coverage and damages. If the court of appeals reverses on the liability issue, without deciding the coverage and damages issues, and the supreme court accepts review on the liability issue only, amended Rule 809.62 (6) preserves the damage and coverage issues raised in the court of appeals and identified in the petition or response for consideration by the court of appeals following remand and remittitur from the supreme court. Remand of a preserved issue will not occur if the supreme court's decision renders the issue moot or of no effect. [Re Order No. 08-04 effective January 1, 2009]

NOTE: Sup. Ct. Order No. 08-15 and 08-18, 2009 WI 4, states "The following Comment to Wis. Stat. §§ (Rule) 809.62 (4) is not adopted but will be published and may be consulted for guidance in interpreting and applying the statute."

Comment, 2008: The electronic copy of a petition for review, response, or appendix is in addition to and not a replacement for the paper copies required under this rule. The filing requirement is satisfied only when the requisite number of paper copies is filed; the transmittal of an electronic copy does not satisfy requirements for a timely filing. A petition for review shall be physically received in the clerk's office within 30 days of the date of the decision of the court of appeals to invoke this court's appellate jurisdiction. *St. John's Home v. Continental Casualty Co.*, 150 Wis. 2d 37, 441 N.W.2d 219 (1989), per curiam. [Re Order No. 08-15 and 08-18 effective July 1, 2009]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Under sub. (1m), an electronic filing user may electronically file a petition for review with the court without also submitting a physical paper copy. The appellate electronic filing rule, s. 809.801 (4) (ar), extends the time of filing until 11:59 p.m. for documents filed through the eFiling system. Taken together, these two provisions supersede the decision in St. John's Home v. Continental Casualty Co., 150 Wis. 2d 37, 441 N.W.2d 219 (1989), per curiam, holding that a petition for review must be physically received by 5:00 p.m. on the 30th day following the filing of the court of appeals decision to invoke the supreme court's appellate jurisdiction.

Sub. (6) is amended to avoid the implication that the respondent in a petition for cross-review may not raise issues other than those identified in the petition for review, consistent the language of sub. (3m) (b).

The supreme court has power to entertain petitions filed by the state in criminal cases. State v. Barrett, 89 Wis. 2d 367, 280 N.W.2d 114 (1979).

"Decision" under sub. (1) [now sub. (1g)] means the result, disposition, or mandate reached by court, not the opinion. Neely v. State, 89 Wis. 2d 755, 279 N.W.2d 255 (1979).

If the court of appeals reverses a defendant's conviction on grounds of insufficiency of evidence, the double jeopardy clause does not bar the supreme court from reviewing the case. State v. Bowden, 93 Wis. 2d 574, 288 N.W.2d 139 (1980).

The supreme court will not order a new trial if the majority concludes that there is prejudicial error but there is no majority with respect to a particular error. "Minority vote pooling" is rejected. State v. Gustafson, 121 Wis. 2d 459, 359 N.W.2d 920 (1985).

Petitions for review must be filed by 5:00 p.m. on the 30th day following the filing of the court of appeals decision. St. John's Home v. Continental Casualty Co., 150 Wis. 2d 37, 441 N.W.2d 219 (1989), per curiam.

Citation to an unpublished court of appeals decision to show conflict between districts for purposes of sub. (1) (d) [now sub. (1r) (d)] is appropriate. State v. Higginbotham, 162 Wis. 2d 978, 471 N.W.2d 24 (1991).

Issues before the court are issues presented in the petition for review and not the discrete arguments that may be made, pro or con, in the disposition of the issue. State v. Weber, 164 Wis. 2d 788, 476 N.W.2d 867 (1991).

Together, s. 809.32 (4) and 977.05 (4) (j) create a statutory, but not constitutional, right to counsel in petitions for review, provided counsel does not determine the appeal to be without merit. If counsel fails to timely file a petition for review, the defendant may petition for a writ of habeas corpus and the supreme court has the power to allow late filing. Schmelzer v. Murphy, 201 Wis. 2d 246, 548 N.W.2d 45 (1996), 95-1096.

The 30-day deadline for receipt of a petition for review is tolled on the date that a pro se prisoner delivers a correctly addressed petition to the proper prison authorities for mailing. State ex rel. Nichols v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292, 00-0853. See also, Brown v. Bradley, 2003 WI 14, 259 Wis. 2d 630, 658 N.W.2d 427, 01-3324.

Petitions for review by the Wisconsin Supreme Court. 1979 WLR 1176.

Discretionary review by the Wisconsin Supreme Court. Wilson & Pokrass. WBB Feb. 1983.

809.63 Rule (Procedure in supreme court). When the supreme court takes jurisdiction of an appeal or other proceeding, the rules governing procedures in the court of appeals are applicable to proceedings in the supreme court unless otherwise ordered by the supreme court in a particular case.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978).

809.64 Rule (Reconsideration). A party may seek reconsideration of the judgment or opinion of the supreme court by filing a motion under s. 809.14 for reconsideration within 20 days after the date of the decision of the supreme court.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1981 c. 390 s. 252; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii.

Judicial Council Committee's Note, 1978: Rule 809.64 replaces former Rules 251.65, 251.67 to 251.69, which provided for motions for rehearing. The necessity for the filing of briefs on a motion for reconsideration as required by former Rule 251.67 is eliminated. The matter will be considered on the motion and supporting and opposing memoranda as with any other motion. The term "reconsideration" is used rather than rehearing because in a case decided without oral argument there has been no initial hearing. [Re Order effective July 1, 1978]

Judicial Council Note, 2001: This section has been changed to specify that the time limit for filing motions for reconsideration of supreme court opinions is calculated from the date, not the filing, of the decision. [Re Order No. 00-02 effective July 1, 2001]

A supreme court order denying a petition to review a court of appeals decision was neither a judgment nor an opinion. Archdiocese of Milwaukee v. Milwaukee, 91 Wis. 2d 625, 284 N.W.2d 29 (1979).

A motion mailed within the 20-day period, but received after the period expired, was not timely and did not merit exemption from the time requirement. Lobermeier v. General Telephone Co. of Wisconsin, 120 Wis. 2d 419, 355 N.W.2d 531 (1984).

SUBCHAPTER VII

ORIGINAL JURISDICTION PROCEDURE
IN SUPREME COURT

809.70 Rule (Original action). (1) A person may request the supreme court to take jurisdiction of an original action by filing a petition which may be supported by a memorandum. The petition shall be served on each party and proposed respondent by traditional methods as provided in s. 809.80 (2). The petition must contain all of the following:

(a) A statement of the issues presented by the controversy.

(b) A statement of the facts necessary to an understanding of the issues.

(c) A statement of the relief sought.

(d) A statement of the reasons why the court should take jurisdiction.

(1m) The clerk of court shall docket the petition upon receipt of the items referred to in sub. (1). The clerk shall assign a case number, create a notice that the petition has been docketed, and send the notice to the parties by traditional methods.

(2) The court may deny the petition or may order the respondent to respond and may order oral argument on the question of taking original jurisdiction. The respondent shall file a response, which may be supported by a memorandum, within 14 days after the service of the order.

(3) The court, upon a consideration of the petition, response, supporting memoranda and argument, may grant or deny the petition. The court, if it grants the petition, may establish a schedule for pleading, briefing and submission with or without oral argument.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1995 a. 225; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Note, 2001: The time limit in sub. (2) was changed from 10 to 14 days. Please see the comment to s. 808.07. [Re Order No. 00-02 effective July 1, 2001]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: A proceeding under this section is a new action that must be served on the respondents by the initiating parties using traditional methods.

809.71 Rule (Supervisory writ). (1) A person may request the supreme court to exercise its supervisory jurisdiction over a court and the judge presiding therein or other person or body by filing a petition in accordance with s. 809.51. The petition shall be served on each party and proposed respondent, and if applicable, upon the originating court or tribunal, by traditional methods as provided in s. 809.80 (2). A person seeking a supervisory writ from the supreme court shall first file a petition for a supervisory writ in the court of appeals under s. 809.51 unless it is impractical to seek the writ in the court of appeals. A petition in the supreme court shall show why it was impractical to seek the writ in the court of appeals or, if a petition had been filed in the court of appeals, the disposition made and reasons given by the court of appeals.

(2) The clerk of court shall docket the petition upon receipt of the items referred to in sub. (1). The clerk shall assign a case number, create a notice that the petition has been docketed, transmit the notice of docketing to the clerk of circuit court if applicable, and send the notice to the parties by traditional methods.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 390 s. 252; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1981: The supreme court will not exercise its supervisory jurisdiction where there is an adequate alternative remedy. Unless the court of appeals is itself the object of the supervisory writ, usually there is an adequate alternative remedy of applying to the court of appeals under Rule 809.51 for the supervisory writ. The amendment to Rule 809.71 establishes that before a person may request the supreme court to exercise its supervisory jurisdiction, the person must first seek the supervisory writ in the court of appeals, unless to do so is impractical. Following the decision of the court of appeals, the amendment does not preclude the supreme court from considering a petition for review under Rule 809.62 or a petition for supervisory writ under Rule 809.71, depending upon the circumstances and the petitioner's ability to establish the respective governing criteria. [Re Order effective Jan. 1, 1982]

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Supervisory writs do not always arise from a pending case through which the parties can be served electronically. A proceeding under this section is a new action that must be served on the respondents by the initiating parties using traditional methods.

A party requesting a supervisory writ under this section must demonstrate that: 1) an appeal is an inadequate remedy; 2) grave hardship or irreparable harm will result; 3) the duty of the trial court is plain, and it acted or intends to act in violation of that duty; and 4) the request for relief is made promptly and speedily. DNR v. Wisconsin Court of Appeals, District IV, 2018 WI 25, 380 Wis. 2d 354, 909 N.W.2d 114, 16-1980.

The term "supervisory writ" is both: 1) the general term used in petitioning the court of appeals to exercise its constitutional supervisory authority and in petitioning the supreme court to exercise its constitutional superintending authority; and 2) a new writ the supreme court devised independent of the traditional common law writs. State ex rel. CityDeck Landing LLC v. Circuit Court for Brown County, 2019 WI 15, 385 Wis. 2d 516, 922 N.W.2d 832, 18-0291.

When the circuit court in this case ordered the arbitration of a private dispute stayed until the court could decide an insurance coverage dispute, the plaintiff fulfilled all four criteria for the supreme court to issue a supervisory writ under this section. State ex rel. CityDeck Landing LLC v. Circuit Court for Brown County, 2019 WI 15, 385 Wis. 2d 516, 922 N.W.2d 832, 18-0291.

SUBCHAPTER VIII

MISCELLANEOUS PROCEDURES IN COURT OF APPEALS AND SUPREME COURT

809.80 Rule (Filing and service of documents by traditional methods). (1) FILING BY TRADITIONAL METHODS. A person who is not an electronic filing user, as defined in s. 809.01 (33), shall file a paper copy of any document required to be filed by these rules with the clerk of the court unless a different

place of filing is expressly required or permitted by statute or rule. The clerk of the court is located at 110 E. Main Street, Madison, Wisconsin 53703. The mailing address for the clerk of the supreme court and the court of appeals is P.O. Box 1688, Madison, Wisconsin 53701-1688.

(2) SERVICE BY TRADITIONAL METHODS. (a) In this subsection, "service by traditional methods" means service in the manner provided in s. 801.14 (1), (2), (2m), and (4) of any document required or authorized under these rules to be filed in a trial or appellate court.

(bm) A party initiating a proceeding under s. 809.51, 809.70 or 809.71 shall serve a petition and memorandum on all parties by traditional methods.

(c) Except as provided in par. (bm), a paper party may initiate a proceeding in the appellate courts without serving electronic filing users by traditional methods. The clerk of the circuit or appellate court shall promptly enter filed documents into the electronic filing system and generate a notice of docketing. Service on electronic filing users shall be as provided in s. 809.10, 809.11, 809.14, 809.32, 809.50, 809.60, or 809.62.

(d) A paper party may file subsequent documents in the appellate courts without serving electronic filing users by traditional methods. The clerk of the circuit or appellate court shall image the documents and promptly enter the documents into the electronic filing system. The notice of activity generated by the entry shall constitute service on the electronic filing users in the case as provided in ss. 801.18 (6) (d) and 809.801 (6) (d).

(e) Paper parties shall be served by traditional methods. Paper parties shall serve other paper parties by traditional methods.

(3) TIME OF FILING BY TRADITIONAL METHODS. (a) *All filings — general rule*. Except as provided in pars. (b) to (e), filing by traditional methods is not timely unless the clerk receives the paper documents within the time fixed for filing. Filing may be accomplished by hand delivery, mail, or by courier. Filing by facsimile is permitted only as set forth in s. 801.16 (2) (a) to (f) and the rules and directives governing facsimile filing in the court of appeals and supreme court. Documents completing transmission after 11:59 p.m. central time are considered filed the next business day the clerk's office is open.

(b) *Brief or appendix — general rule*. Except as provided in par. (c), a brief or appendix is timely filed if, on or before the last day of the time fixed for filing, it is correctly addressed and:

1. Deposited in the United States mail for delivery to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage pre-paid; or
2. Delivered to a 3rd-party commercial carrier for delivery to the clerk within 3 calendar days.

(c) *Pro se brief or appendix from person confined in institution — special rule*. A pro se brief or appendix from a person confined in an institution is timely filed if the brief or appendix is correctly addressed and delivered to the proper institution authorities for mailing on or before the last day of the time fixed for filing. A confined person who mails a brief or appendix under this subsection shall also file a certification or affidavit setting forth the date on which the document was delivered to the proper institution authorities for mailing.

(d) *Petition for review—general rule*. Except as provided in par. (e), a petition for review is timely filed only if the clerk actually receives the petition within the time fixed for filing.

(e) *Pro se petition for review from person confined in institution — special rule*. The 30-day time limit for the clerk's receipt of a pro se petition for review filed by a person confined in an institution is tolled on the date that the confined person delivers a correctly addressed petition to the proper institution authorities for mailing. The confined person shall also file a certification or affidavit setting forth the date on which the petition was delivered to the proper institution authorities for mailing.

(4) PROOF OF FILING DATE FOR BRIEF OR APPENDIX FILED BY TRADITIONAL METHODS. (a) When a brief or appendix is filed by mail or commercial carrier in accordance with s. 809.80 (3) (b), the person filing the document shall include a certification or affidavit setting forth the date and manner by which the document was mailed or delivered to a 3rd-party commercial carrier.

(b) If a certification or affidavit is included, the clerk's office shall consider the brief or appendix filed on the date of mailing or delivery set forth in the certification or affidavit. If no certification or affidavit is included, the date of filing shall be the date on which the brief or appendix is received by the clerk's office.

(c) The date shown on a postage meter does not establish that the document was mailed on that date.

(5) CLERK REVIEW. (a) *Clerk review*. The clerk may review a document for compliance with rule requirements relating to form, including caption, format, length, and confidentiality, to determine if the electronic document should be accepted for filing. If the clerk rejects the document following review, the filer shall receive notification of the rejection. The filer may be required to resubmit the document.

(6) PRINTING SPECIFICATIONS. When paper copies of briefs or appendices in cases are required to be filed or served, the briefs or appendices shall be printed, typed, duplicated or reproduced by a process that produces a clear, black image of the text on white paper, in conformity with this chapter.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1981 c. 390 s. 252; Sup. Ct. Order, 130 Wis. 2d xi (1986); 1989 a. 31; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; 2005 a. 253; Sup. Ct. Order No. 08-15 and Sup. Ct. Order No. 08-18, 2009 WI 4, 311 Wis. 2d xxix; Sup. Ct. Order No. 13-10, 2014 WI 45, 354 Wis. 2d xliii; Sup. Ct. Order No. 14-03, 2016 WI 29, 368 Wis. 2d xiii; Sup. Ct. Order No. 14-03A, 2016 WI 80, 370 Wis. 2d xxxiii; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: The prior requirement of an affidavit of service is eliminated. The provision of the Rules of Civil Procedure that the filing of a paper is a certification that the paper has been served is adopted. [Re Order effective July 1, 1978]

Judicial Council Note, 1986: Sub. (2) (b) does not change the existing service rules; it is intended to consolidate and clarify the procedure specified by ss. 59.47 (7), 165.25 (1) and 752.31 (2) and (3). [Re Order effective July 1, 1986]

Judicial Council Note, 2001: Subsection (1) was amended to provide the correct address of the clerk of the supreme court and court of appeals. [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: Subsections (3) through (4) are new, and are taken largely from the Federal Rules of Appellate Procedure, Rule 25. Under the former rules, a brief was not filed until the clerk physically received it, regardless of when the brief may have been mailed. Because a party outside the Madison area had to allow time for postal or courier delivery, briefing periods were often adversely affected merely to ensure that a brief was actually received by the clerk before the expiration of the filing deadline.

Subsection (3) (a) retains the general rule that a document is not filed until it is received by the clerk. Filing may be accomplished in person, by mail, or by courier or common carrier. Electronic filing of papers, other than filing by facsimile, is not permitted unless otherwise ordered by the supreme court. See s. 801.16 (2) addressing rules governing facsimile filing. The supreme court and the court of appeals have adopted local rules governing facsimile filing.

However, sub. (3) (b) creates a mailbox rule for briefs and appendices only. For briefs and appendices, filing will be considered timely if, on or before the deadline, the brief or appendix is correctly addressed and either: (a) deposited in the United States mail for delivery by first-class mail, or other class of mail at least as expeditious, postage pre-paid, or (b) delivered to a commercial delivery service for delivery within 3 calendar days. When a brief or appendix is mailed or sent by commercial courier, subsection (4) requires that the party also file a certification or affidavit of mailing stating the date and manner of mailing or delivery.

Subsection (3) (c) addresses pro se briefs and appendices filed by confined persons. For confined persons, a brief or appendix will be timely filed if, on or before the deadline, the brief or appendix is correctly addressed and delivered to the proper institution authorities for mailing. In order for the brief or appendix to be timely filed under sub. (3) (c), a certification or affidavit must be filed stating the date on which the brief or appendix was delivered to the proper institution authorities for mailing. The important point is that the pro se confined person must follow the institution rules or practices as to outgoing mail—whether they require placing mail in the hands of certain institution authorities, depositing mail in a designated receptacle, or some other procedure. See *State ex rel. Nichols v. Litscher*, 2001 WI 119 ¶ 32 n. 6, 247 Wis. 2d 1013, 1028 n. 6, 635 N.W.2d 292.

Subsection (3) (d) reiterates the long-standing rule that a petition for review filed with the clerk of the supreme court must actually be received by the clerk on or before the last day of the filing period. The time limit for filing a petition for review cannot be extended. The timely filing of a petition for review is necessary to invoke the supreme court's appellate jurisdiction. See *First Wis. Nat'l Bank of Madison v. Nicholaou*, 87 Wis. 2d 360, 274 N.W.2d 704 (1979). The mailbox rule for briefs and appendices created in sub. (3) (b) does not apply to the filing of a petition for review under s. 809.62.

Subsection (3) (e) expands the coverage of the rule tolling the time limit for the clerk's receipt of a pro se petition for review from a prisoner on the date the prisoner delivers a correctly addressed petition to the proper prison authorities, as established in *State ex rel. Nichols v. Litscher, supra*, to include petitions for review from all pro se confined persons. Subsection (3) (e) also adds a requirement for filing of a certification or affidavit setting forth the date on which the petition for review was delivered to the proper institution authorities for mailing. The important point is that in order to trigger tolling, the pro se confined person must follow the institution rules or practices as to outgoing mail—whether they require placing mail in the hands of certain institution authorities, depositing mail in a designated receptacle, or some other procedure. See *State ex rel. Nichols v. Litscher, supra*. [Re Order No. 02-01 effective January 1, 2003]

To avoid potential delay, address all types of mail to: Clerk of the Court, Supreme Court of Wisconsin, P. O. Box 1688, Madison, WI 53701. Gunderson v. State, 106 Wis. 2d 611, 318 N.W.2d 779 (1982).

NOTE: Sup. Ct. Order No. 14-03 states that "the Comments to the statutes and to the supreme court rules created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2016: Subd. (3) (a) is amended to maintain the time for filing by facsimile in the appellate courts as the regular business hours of the clerk of the supreme court and court of appeals.

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Section 809.80 adds the term "traditional methods" to refer to forms of filing and service such as hand-delivery and mail, describes how paper parties may file their documents, and outlines the standards that paper briefs must meet for format, printing, and proof of mailing. This is distinguished from electronic filing and service, which are addressed in s. 809.801.

Sub. (2) does not require a paper party to provide service of a filed document on an electronic party. Because the clerk will be scanning all paper documents submitted by paper parties, electronic filing users will automatically receive notification of new paper documents without the need for traditional service. The current provision regarding service on the attorney general in certain cases has been moved to s. 809.802.

Under sub. (3), documents faxed by 11:59 pm are considered filed the same day. This gives paper parties the same filing hours as electronic parties. The appellate courts place a number of restrictions on filing by fax with respect to length, type of document, and payment of applicable fees. Persons wishing to file by fax should consult the clerk's office for guidance.

Since 2009, the appellate clerk has reviewed electronic briefs to make sure that rule requirements relating to form have been met. Under sub. (5), the clerk's review includes review of all filed documents, both paper and electronic. The same review is applied to electronic documents under s. 809.801 (4) (b).

809.801 Rule (Appellate electronic filing). (1) DEFINITIONS.

The definitions in s. 809.01 apply in this section.

(2) EFFECTIVE DATE; APPLICABILITY. (a) At the direction of the supreme court, the director shall implement an electronic filing system for the Wisconsin supreme court and court of appeals. The requirements of this section shall govern the electronic filing of documents in all types of actions and proceedings in the appellate courts.

(b) At the direction of the supreme court, mandatory use of the electronic filing system shall be phased in according to a schedule set by the director until the system has been fully implemented. Information about the transition schedule shall be made readily available to the public in advance of its application.

(c) Subject to the schedule in par. (b), mandatory users shall be required to use the appellate court electronic filing system for all new filings covered by the schedule. Electronic filing shall be required for all new actions and proceedings brought in the court of appeals and the supreme court, and for all new documents submitted in previously filed cases, except as otherwise provided in this section.

(e) Electronic filing is limited to methods specifically approved by the director. The director may enter into an agreement with any state agency to allow electronic filing through a custom data exchange between the court case management system and the agency's automated information system. Parties using a custom data exchange are considered mandatory users and are subject to the requirements of this section.

(f) The procedures in this section shall be interpreted in a manner consistent with existing procedures. This section is not intended to limit the director's approval of new technologies that accomplish the same functions.

(g) All judicial officers, the clerk of court, and all court staff shall cooperate and assist with the implementation of electronic filing.

(h) This section does not apply to documents required by law to be filed with court officials that are not filed in an action before the court. These documents may be filed by traditional methods unless otherwise required.

(k) The procedures under this section are intended to be consistent with the procedures governing electronic filing and service in the circuit courts under s. 801.18. The circuit and appellate court electronic filing and service rules shall be interpreted consistently to the extent practicable.

(3) Registration requirements. (a) The following individuals shall register for access to the electronic filing system prior to filing documents:

1. Licensed Wisconsin attorneys.
2. Attorneys appearing under SCR 10.03 (4).
3. High-volume filing agents.

(b) Parties who are not subject to par. (a) may voluntarily register to use the electronic filing system.

(c) Except as otherwise provided, a party not subject to par. (a) who does not choose to participate in the electronic filing system under par. (b) shall file, serve, and receive paper documents by traditional methods.

(d) All users shall register through the electronic filing system by executing a user agreement governing the system's terms of use. To register, users must have the capability to produce, file, and receive electronic documents meeting the technical requirements of the electronic filing system. The electronic filing system shall make information on the technical requirements for filing readily available. By registering, users agree to electronically file all documents to the extent the electronic filing system can accept them. Users shall promptly provide notice through the electronic filing system of any change in the information provided for registration.

(e) Upon completion of a properly executed user agreement under par. (d), the electronic filing system shall provide the user with a confidential, secure authentication procedure for access to the electronic filing system. This authentication procedure shall be used only by that user and by any agents or employees that the user authorizes. The same authentication procedure shall be used for all cases on which the user is an attorney or a party. The electronic filing system may reset authentication procedures as needed for administrative and security purposes. Upon learning that the confidentiality of the authentication procedure has been inadvertently or improperly disclosed, the user shall immediately report that fact through the electronic filing system

(f) After registering to use the electronic filing system, a user shall also opt in as an attorney or party on any case in which the user intends to participate. Users shall promptly opt in or out on each case upon beginning or ending appearance as an attorney or as a party. Filing agents appearing under par. (a) or (b) shall promptly opt in or out upon any change in the identity of a filing agent. Mandatory users who do not opt in on a case will not receive notices of activity or service of documents.

(g) Attorneys appearing under SCR 10.03 (4) shall register following court approval of a motion to appear *pro hac vice*.

(i) Voluntary users who wish to opt out of a particular case shall use the "opt out" feature of the electronic filing system or notify the clerk of court. The electronic filing system shall indicate that traditional methods must be used for this party for future filings and service.

(j) The electronic filing system may provide a method for filing documents by individuals who are not parties to the case. It may also provide a method for professionals and agencies associated with the case to receive information and file reports.

(4) Time and effect of electronic filing. (a) The electronic filing system is an agent of the appellate courts for purposes of filing, receipt, service, and retrieval of electronic documents. The electronic filing system shall receive electronic filings 24 hours per day except when undergoing maintenance or repair.

(am) A document is considered filed on a particular day if the submission is completed by 11:59 p.m. central time, as recorded by the electronic filing system, so long as it is subsequently accepted by the clerk of court upon review. Documents filed after 11:59 p.m. are considered filed the next day the clerk's office is open. The expanded availability of time to file shall not affect the calculation of time under other statutes, rules, and court orders. The electronic filing system shall issue a confirmation that submission to the electronic filing system is complete.

(b) When a document is submitted by a user to the electronic filing system, the electronic filing system shall transmit it to the appropriate clerk of court. The clerk may review documents for compliance with rule requirements relating to form, including caption, case number, format, length, and confidentiality, to determine if the documents should be accepted for filing.

(c) If the clerk of court accepts a document for filing, it shall be considered filed with the court at the date and time of the original submission, as recorded by the electronic filing system. The electronic filing system shall issue a notice of activity to serve as proof of filing. When personal service or traditional service is not required, the notice of activity shall constitute service on the other users in the case.

(cm) If the clerk rejects the document following review, the user shall receive notification of the rejection. The user may be required to resubmit the document.

(5) Commencement of action or proceeding; filing of initiating documents. (a) *Original actions, writs, and other matters commenced in the appellate courts*. A user seeking to initiate an action or proceeding in an appellate court under s. 757.85 (5), 809.51, 809.70, or 809.71 shall first register with the electronic filing system as provided in sub. (3). The user shall then file an initiating document in the appellate court and provide the additional information requested by the electronic filing system. At the written or oral request of the filer, the clerk of court may reject the document for filings made in error, if the request is made before the clerk of court has accepted the document. Initiating documents shall be served by traditional methods unless the responding party has consented in writing to accept electronic service or service by some other method.

(b) *Petitions for review and petitions to bypass*. A user seeking review by the supreme court under s. 809.60 or 809.62 shall file an initiating document in the supreme court. At the written or oral request of the filer, the clerk may reject the document for filings made in error, if the request is made before the clerk has accepted the document. Service shall be as provided in s. 809.60 (1) (b) or s. 809.62 (1m) (a) 2.

(c) *Appeals from circuit court*. A user seeking to initiate an appeal under s. 809.10, 809.103, 809.104, 809.105, 809.107, 809.30, 809.32, or 809.40 shall file a notice of appeal in the circuit court case appealed from as provided in that section. The clerk of circuit court shall transmit the notice of appeal to the clerk of the

court of appeals. The docketing statement, motions under s. 809.41 (1) or (4), and statement on transcript, where applicable, shall also be filed with the clerk of circuit court and transmitted to the clerk of the court of appeals. Service shall be as provided in s. 809.10 (1) (h).

(d) *Petitions for leave to appeal*. A user seeking leave to appeal under s. 809.50 shall file a petition in the court of appeals and provide the additional information requested by the electronic filing system. At the written or oral request of the filer, the clerk of the court of appeals may reject the document for filings made in error, if the request is made before the clerk has accepted the document. Service shall be as provided in s. 809.50 (1m).

(e) *Motions prior to appeal*. A user moving the court for an order or other relief under s. 809.14 (5) before a notice of appeal is filed shall file an initiating document in the court of appeals and provide the additional information requested by the electronic filing system. At the written or oral request of the filer, the clerk of the court of appeals may reject the document for filings made in error, if the request is made before the clerk has accepted the document. Service shall be as provided in s. 809.14 (5) (b).

(f) *Respondent to opt in*. A mandatory user who represents a responding party shall register to use the electronic filing system as provided under sub. (3) (d). After registering to use the electronic filing system, the user shall opt in on the case as provided in sub. (3) (f).

(6) FILING AND SERVICE OF SUBSEQUENT DOCUMENTS. (a) The electronic filing system shall generate a notice of activity to the other users in the case when documents other than initiating documents are filed. Users shall access filed documents through the appellate electronic filing system. For documents that do not require personal or traditional service, the notice of activity is valid and effective service on the other users and shall have the same effect as traditional service of a paper document.

(b) If a document requires personal or traditional service, it shall be served by traditional methods unless the responding party has consented in writing to accept electronic service or service by some other method.

(c) Paper parties shall be served by traditional methods. The electronic filing system shall indicate which parties are to be served electronically and which are to be served by traditional methods.

(d) Paper parties shall file documents with the court by traditional methods. The clerk of court shall image the documents and enter the imaged documents into the electronic filing system promptly. The notice of activity generated by the entry shall constitute service on the users in the case. Paper parties shall serve other paper parties by traditional methods.

(e) An electronic notification that cannot be successfully delivered to a user shall be returned to the clerk of court. If the clerk cannot contact the user to update the information, the user shall be treated as a paper party until the problem is corrected.

(f) For cases that were originally filed by traditional methods, all of the following apply:

1. Subject to the schedule in sub. (2) (b), all mandatory users shall opt in on each case for which they continue to appear. Mandatory users who do not opt in on a case do not receive notices of activity or service of documents.

2. For all cases that are in open status at the time electronic filing is mandated, the clerk of court shall send a notice by traditional methods to each party who has not opted in stating that the case has been converted to electronic filing. Mandatory users shall promptly opt in on these cases unless the user informs the court that the user is no longer appearing on behalf of the party.

3. For all cases that were in closed status prior to the time electronic filing was mandated, no action is required until there is a subsequent filing or the court initiates further activity on the case, subject to all of the following:

a. A mandatory user who wishes to file on a closed case shall opt in on the case and shall serve any paper parties by traditional methods. Any mandatory user so served shall promptly opt in on the case or shall notify the court that the user is no longer appearing on behalf of the party.

b. A voluntary user who wishes to file electronically in a closed case shall opt in as a user on the case and shall serve any paper parties by traditional methods. Any mandatory user so served shall promptly opt in on the case or shall notify the court that the user is no longer appearing on behalf of the party.

c. Service on a party who might be a voluntary user shall include a notice stating that the case has been converted to electronic filing and giving instructions for how to use the electronic filing system if the party chooses to do so.

(7) PAYMENT OF FEES. (a) Users shall make payments due to the clerk of court by check or through the court electronic payment system, unless otherwise ordered by the court or unless arrangements are made with the clerk of court. The court electronic payment system shall deposit the fees due to the clerk of court in the clerk's account.

(b) A user may submit a petition or motion for waiver of costs and fees under s. 814.29 (1) or (1m) using a form provided by the court for that purpose. If a document is submitted with a petition or motion for waiver, it shall be considered filed with the court on the date and time of the original submission if the waiver is subsequently granted by the court or other arrangements for payment are made.

(8) FORMAT AND CONTENT OF FILINGS. (a) The director shall make information about the technical requirements of the electronic filing system readily available to the public. Users are responsible for keeping up with these requirements and providing the necessary equipment, software, communication technology, and staff training.

(b) Users shall provide any case management information needed to file documents. The electronic filing system shall reject a document for failure to include information in any one of the mandatory fields identified by the system.

(c) Users shall format the appearance of all electronically filed documents in accordance with statutes and appellate court rules governing formatting of paper documents, including page limits.

(d) The electronic filing system may set limits on the length or number of documents. Leave of court may be granted for traditional filing and service in appropriate cases. If a brief or appendix cannot be electronically filed as a single document due to the size limitations of the system, the user shall contact the clerk of court for assistance.

(e) Electronically filed appendices, exhibits, and affidavits shall be filed in portable document format. All other electronically filed documents shall be filed in text-searchable portable document format.

(f) Electronically filed documents may include bookmarks that allow the reader to navigate quickly within a document, such as from the table of contents to the corresponding sections of a brief or from the table of contents to the corresponding documents in an appendix.

(g) Electronically filed documents may include hyperlinks that allow the reader to jump directly to another location in the document or to an external source of information, such as a published case or statute posted on the Internet. External hyperlinks shall be used only in accordance with security procedures set by the court.

(h) Users shall format electronically filed documents to leave a blank space 2 inches by 2 inches square at the top right corner of the first page to accommodate the court file stamp.

(9) OFFICIAL RECORD. (a) Electronically filed documents have the same force and effect as documents filed by traditional methods. The electronic version constitutes the official record. No paper copy of an electronically filed document shall be sent to the court.

(b) The duties of the clerk of court under this chapter and all other statutes, court rules, and procedures may be fulfilled through proper management of electronic documents as provided in this section. The requirements of statutes and rules that refer to paper copies, originals, mailing, and other traditional methods may be satisfied by transmission of documents through the electronic filing system.

(c) Subject to the schedule in sub. (2) (b), the clerk of court shall maintain the official court record only in electronic format for all cases commenced after that date. Documents filed by traditional methods shall be electronically imaged and made part of the official record. The clerk of court may discard the paper copy pursuant to SCR 72.03 (3). Any official court record containing electronically filed documents must meet the operational standards set by SCR 72.05 for electronic records.

(d) If a document is filed in a case in closed status, the clerk of court shall file the document electronically and convert that case to electronic format within a reasonable time. If conversion of the case would be unusually burdensome, the clerk of court may maintain the record in paper format with the permission of the court.

(e) The clerk of court shall make the public portions of the electronic record available for viewing at the clerk of court's office. The clerk of court shall make nonpublic portions of the electronic record available for viewing by authorized persons.

(f) The clerk of court may provide either paper or electronic copies of pages from the court record. The clerk of court shall charge the per-page fee set by s. 809.25 (2) for electronic court records.

(g) Certified copies of an electronic record may be obtained from the clerk of court's office by traditional methods, as provided by s. 889.08. The electronic system may also make available a process for electronic certification of the court record. The seal of the court may be applied electronically. No use of colored ink or an impressed seal is required.

(h) Parties filing by traditional methods shall file a copy of any document and not the original paper document. The court may require the submitting party to produce the original paper document if authenticity of document is challenged. If the court inspects the original paper document, it shall be retained as an exhibit as provided in SCR 72.03 (4).

(L) For documentary exhibits submitted directly to the supreme court or court of appeals, parties shall submit a copy of the exhibit and not the original. The clerk of court shall image each documentary exhibit and enter the imaged document into the court record. Copies of documentary exhibits so imaged may be discarded as provided in SCR 72.03 (3). If inspection of the original document is necessary to the court proceeding, the court may order that the original document be produced. Any original document so produced shall be retained as an exhibit as provided in SCR 72.03 (4).

(m) When an action or proceeding requires a record to be submitted by a party directly to the court, the record shall be imaged and electronically submitted using a method provided by the electronic filing system. The electronic record shall be the official record in the action or proceeding. If inspection of an original document is necessary to the court proceeding, the court may order that the original document be produced.

(11) NOTARIZATION AND OATHS. (a) Notaries public who hold valid appointments under ch. 140 may issue certificates of notarial acts for electronically filed documents as provided in this section.

(b) Court officials authorized by law to perform notarial acts may do so by application of their electronic signatures provided through the electronic filing system.

(c) Unless specifically required by statute or court rule, electronically filed documents are not required to be notarized.

(d) Documents notarized by traditional methods may be filed through the electronic filing system if a handwritten signature and physical seal appear on the original document. The user shall submit an imaged copy of the notarized document to the electronic filing system, and the court shall maintain the imaged copy as the official court record. The court may require the submitting party to produce the original paper document if the authenticity of the notarization is in question.

(f) The director, in his or her discretion, may approve the use of an electronic notary technology compatible with the existing electronic filing system.

(12) SIGNATURES OF USERS. (a) To be considered electronically signed, a document must be submitted by or on behalf of a user through the electronic filing system. A document requiring the signature of a user shall bear either an electronic signature or a handwritten signature applied to a document before it is imaged. An electronic signature shall state "Electronically signed by" followed by the name of the signatory, and shall be placed where the person's signature would otherwise appear. Either form of signature shall be treated as the user's personal original signature for all purposes under the statutes and court rules.

(b) An initiating document that is signed in compliance with par. (a) bears a sufficient signature under s. 802.05.

(c) Each electronically filed document shall bear that person's name, mailing address, electronic mail address, telephone number, and state bar number if applicable. Users shall notify the electronic filing system of any change in this information, consistent with sub. (3) (d).

(d) An attorney may delegate the authority to submit documents to the electronic filing system to a person under the attorney's supervision. Any document requiring the attorney's signature is deemed to have been signed by the attorney if submitted to the electronic filing system and signed as provided in par. (a). Every attorney is responsible for all documents so submitted.

(e) Every attorney is responsible for electronically filed documents to the same extent as for paper filings. Attorneys using the electronic filing system are subject to sanctions under s. 802.05 and contempt procedures under ch. 785, and are subject to discipline for a violation of any duty to the court under the supreme court rules.

(f) Self-represented parties and filing agents under s. 799.06 are responsible for electronically filed documents to the same extent as for paper filings. Self-represented parties and filing agents using the electronic filing system are subject to sanctions under s. 802.05 and contempt procedures under ch. 785.

(fm) An electronically filed certification required by this chapter may be signed by applying the user's signature as provided in par. (a).

(g) A stipulation will be considered signed by multiple persons if it bears the handwritten signatures of all signatories or if it bears the printed name of each signatory and contains a representation by the filing party that the filing party has consulted with the signatories and all have agreed to sign the document. This paragraph does not apply to the signature requirements of s. 809.107 (2) (bm) 6., (5) (a), and (6) (f), where a signature is required from the appellant or petitioner, other than the state, on whose behalf the document is filed.

(h) For paper parties, every document requiring a signature shall be signed using a handwritten signature. If a document requiring a signature is filed by traditional methods, the filing party shall file a copy of that document and not the original paper document, as provided under sub. (9) (h).

(i) Documents containing handwritten signatures of third parties, such as affidavits, may be filed through the electronic filing system if a handwritten signature appears on the original document. The user shall submit an imaged copy of the signed document to the electronic filing system, and the court shall maintain the imaged document as the official court record. The court may require the submitting party to produce the original paper document if validity of the signature is challenged.

(j) The director, in his or her discretion, may approve the use of other signature technologies to the extent that they work with the existing electronic filing system.

(13) Signatures of court officials. (a) If the signature of a court official is required on a document, an electronic signature applied through the court case management system may be used. The electronic signature shall be treated as the court official's personal original signature for all purposes under Wisconsin statutes and court rules. Where a handwritten signature would be located on a particular order, form, letter, or other document, the official's printed name shall be inserted.

(b) The electronic signature of a court official shall be used only by the official to whom it is assigned and by such delegates as the official may authorize. The court official is responsible for any use of his or her electronic signature by an authorized delegate.

(c) A court official may delegate the use of his or her electronic signature to an authorized staff member pursuant to the security procedures of the court case management system. Upon learning that the confidentiality of the electronic signature has been inadvertently or improperly disclosed, the court official shall immediately report that fact to the consolidated court automation programs. Court officials shall safeguard the security of their electronic signatures and exercise care in delegation.

(14) Confidential information. (a) The confidentiality of an electronic record is the same as for the equivalent paper record. The electronic filing system may permit access to confidential information only to the extent provided by law. No person in possession of a confidential electronic record, or an electronic or paper copy thereof, may release the information to any other person except as provided by law.

(b) Parties shall exercise care with respect to redaction of protected information, as defined in s. 801.19 (1), identification of confidential material, and sealing of filed documents.

(c) If a document is confidential, it shall be identified as confidential by the submitting party when it is filed. The clerk of court is not required to review documents to determine if confidential information is contained within them.

(d) If a user seeks court approval to seal a document, the user may electronically file the document under temporary seal pending court approval of the user's motion to seal.

(e) If the clerk notes that a document has been identified as confidential or sealed, the electronic filing system shall place a visible mark on the document to identify it as confidential or sealed.

(f) An amicus party may, in the court's discretion, be granted access to confidential, redacted, or sealed portions of the court record upon motion to the court and a showing of good cause.

(15) Transcripts. (a) A transcript filed in the circuit court shall be electronically transmitted to the clerk of the court of appeals when made part of the record on appeal.

(b) The transcript of any proceeding originating in the court of appeals or supreme court shall be electronically filed by the court reporter in accordance with procedures developed by the director. The clerk shall note in the court record that the transcript has been prepared and filed with the court.

(c) Arrangements for payment of the court reporter, access to the transcript, and service shall be as directed by the court.

(d) Any notice to the clerk of the supreme court and court of appeals filed under s. 809.11 (7) (a) or 809.32 (5) or any motion filed under s. 809.11 (7) (c) shall be electronically filed. The court reporter shall serve paper parties by traditional methods.

(e) A transcript, when filed under this section, becomes a part of the court file. The transcript shall be made available to the public in accordance with the statutes and rules governing court records and any court orders.

(f) A court reporter may certify that the transcript is a verbatim transcript of the proceedings by applying the court reporter's signature in the same manner as provided in sub. (12) (a) and then electronically filing the transcript.

(16) TECHNICAL FAILURES. (a) A user whose filing is made untimely as a result of a technical failure may seek appropriate relief from the court as follows:

1. If the failure is caused by the court electronic filing system, a user may move the court for relief on the basis that the user attempted to file the document with the court in a timely manner by submitting it to the electronic filing system. The court may enter an order permitting the document to be deemed filed or served on the date and time the user first attempted to submit the document electronically or may grant other relief as appropriate.

2. If the failure is not caused by the court electronic filing system, the court may grant appropriate relief upon satisfactory proof of the cause. Users are responsible for timely filing of electronic documents to the same extent as filing of paper documents.

(b) A motion for relief due to technical failure shall be made on the next day the office of the clerk of court is open. The document that the user attempted to file shall be filed separately and any fees due shall be paid at that time.

(c) This subsection shall be liberally applied to avoid prejudice to any person using the electronic filing system in good faith.

History: Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21; 2021 a. 240 s. 30.

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Although proposed s. 809.801 is new, the numbering reflects an effort to stay parallel with the section numbering of the circuit court eFiling rule, s. 801.18.

Section 809.801 is built on the template of the circuit court electronic filing rule, s. 809.18, with respect to structure, language, and procedure. There are no major differences between the two systems with respect to how electronic filing works. Sub.(2) (k) provides that the two rules "shall be interpreted consistently to the extent practicable".

At the direction of the supreme court, subs. (2) (b) and (c) provide for the use of an implementation schedule to govern the availability of electronic filing according to the type of proceeding involved and the type of court.

Sub. (3) (a) mandates that three types of filers participate in the electronic filing system. An exception for attorneys representing themselves was included in the circuit court electronic filing rule but is eliminated here. Experience has shown that electronic filing is straightforward to use, with minimal technical impediments and expense.

Subs. (3) (d) and (f) require electronic filing users to promptly opt in and opt out from the cases where they are representing parties or participating as litigants. Users are required to keep their contact information up to date to receive electronic service.

Under sub. (3) (j), persons filing documents in cases where they are not parties, such as amicus curiae, may register to use the electronic filing system and file a document.

Sub. (4) (am) provides that filing occurs when the document is submitted to the electronic filing system as long as it is accepted by the clerk at a later time. Extending the filing day to 11:59 p.m. is consistent with the circuit court electronic filing rule and federal court electronic filing rules. This supersedes the decision in *St. John's Home v. Continental Casualty Co.*, 150 Wis. 2d 37, 441 N.W.2d 219 (1989), per curiam, requiring filing to occur only within the office hours of the clerk. This gives a user an extra few hours to file on the last day a document is due but does not otherwise affect the calculation of time. If a user submits a document or the court issues an order on a day when the clerk's office is closed, it is considered filed on the next day the clerk's office is open, except as provided by other statutes and rules, or by court order.

Since 2009, the appellate clerk has reviewed electronic briefs to make sure that rule requirements relating to form have been met. Together with s. 809.80 (5), subd. (4) (b) provides that the clerk may review all types of documents, both paper and electronic.

Sub. (4) (c) is consistent with s. 809.80 (2) (d), which provides that a document filed by a paper party will be served on the electronic users when the clerk scans and dockets the document and a notice of activity is generated.

Sub. (5) addresses how the first document or group of documents should be filed in each type of appellate proceeding.

Sub. (6) (a) provides that the electronic filing system now serves as the means of delivery between users for documents filed after the case is initiated. Electronic filing users will receive a notice of activity letting them know that a new document has been filed in the proceeding. Paper parties will continue to be served by traditional methods for both initiating and subsequent documents.

Sub. (6) (e) provides that if an email to a party is returned as undeliverable, the clerk will attempt to locate the party and correct the problem. The other parties must serve that party by traditional methods in the meantime.

Sub. (6) (f) outlines how mandatory electronic filing will be initiated on previously filed cases. The clerk will work with attorneys to opt in on their open cases and will provide voluntary users with instructions on how to participate in the electronic filing system if they choose.

Sub. (8) (a) requires electronic filing users to keep their hardware, software, and staff training up to date with the minimum requirements set by the court.

Under former s. 809.18 (12), the supreme court required that briefs, no-merit reports, and petitions for review be submitted in text-searchable portable document format (PDF). Sub. (8) (e) broadens this requirement to include most documents submitted to the court, including motions, writs and petitions. Appendices, exhibits, and affidavits must be submitted in portable document format but are not required to be text-searchable.

Sub. (8) (g) provides for the permissive use of external hyperlinks to sources of information such as published cases and statutes posted on the Internet. Hyperlinks come with a small amount of risk for the introduction of malicious software into the electronic filing system and into law office case management systems. For that reason, hyperlinks may be used only in accordance with guidance posted by the court, and the court may limit the sites that users may link to. The use of hyperlinks is not required.

Sub. (9) provides that appellate court case files going forward will be kept electronically. Mandatory electronic filing users are required to file all documents electronically, with only a few exceptions. The documents submitted by paper parties will be imaged and converted to electronic format by the clerk of court. Because any paper submitted will be discarded after it is imaged, parties should not submit original documents to the court.

Sub. (12) (a) is amended to clarify the required format of an electronic signature. Handwritten signatures continue to be used despite the availability of electronic signatures and are permitted as long as the document is imaged and submitted through the electronic filing system. Either form of signature provides the level of accountability to client and court called for by the appellate rules. Compliance with

this section is intended to satisfy the signature requirements of ss. 802.05 (1) and 809.19 (1) (h), as well as all other statutes and rules relating to court documents.

Sub. (12) (fm) is added to permit the use of electronic signatures for certifying briefs, appendices, and no-merit reports as to length, confidentiality, and client counseling.

Sub. (12) (g) responds to a recent legislative change requiring the signature of both counsel and parents on the notice of appeal in proceedings for termination of parental rights. A representation that all signatories have agreed to sign the document cannot be used in lieu of the parents' signatures in this situation.

Sub. (14) (b) refers to circuit court requirements regarding confidential, redacted, and sealed documents. Documents added to the circuit court record since 2016 should already be in compliance with ss. 801.19 to 809.21.

Sub. (15) (a) notes that circuit court transcripts are generally not filed directly with the appellate court. Transcripts are electronically transmitted by the clerk of circuit court as part of the record on appeal. When transcripts are filed directly with the appellate court, sub. (15) (c) provides that arrangements for payment, copies and service shall be as directed by the court.

809.802 Rule (Service on the state in certain proceedings). (1) Any document required or authorized to be served on the state in appeals and other proceedings in felony cases in the court of appeals or supreme court shall be served on the attorney general unless the district attorney has been authorized under s. 978.05 (5) to represent the state. Any document required or authorized to be served on the state in appeals and other proceedings in misdemeanor cases decided by a single court of appeals judge under s. 752.31 (2) and (3) shall be served on the district attorney. Every petition for review of a decision of the court of appeals in a misdemeanor case shall be served on the attorney general.

(2) Where service on the attorney general is required under sub. (1), the clerk of the court of appeals shall opt in the attorney general as an attorney for the state and provide the notice of docketing to the attorney general through the appellate electronic filing system. For the attorney general, receipt of the notice of docketing provides access to the proceeding and constitutes service of the initiating document and other documents filed with the initiating documents.

History: Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

NOTE: Sup. Ct. Order No. 20-07 states that "the Comments to the statutes created pursuant to this order are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Comment, 2021: Former s. 809.80 (2) is recreated as sub. (1). The requirement to serve the attorney general under this section applies to both traditional and electronic modes of service. Sub. (2) describes the mechanism the clerk will use to assure service on the attorney general in cases where the other electronic parties are served with initiating documents through the circuit court electronic filing system or when the attorney general did not participate in a proceeding before a petition for review was filed.

809.81 Rule (Form of papers). The format of a document filed in the court must conform to the following requirements unless expressly provided otherwise in these rules:

(1) SIZE. Formatted to fit 8.5 by 11 inch paper.

(3) STYLE. Produced using either a monospaced or a proportional serif font. If handwriting is used, the text must be legibly printed and not include cursive writing, except the person's signature.

(4) SPACING AND MARGINS. Double-spaced with a minimum of a 1.25-inch margin on the right and left sides, and a minimum of a 1-inch margin on the top and bottom.

(5) PAGINATION. Paginated at the center of the bottom margin using Arabic numerals with sequential numbering starting at "1" on the first page.

(6) APPEARANCE. Any process that produces a clear, black image on a white background. Carbon copies may not be filed. Imaged documents should be scanned at a resolution sufficient to ensure legibility.

(7) BINDING. Pages must be secured together at the top left corner.

(8) CONFIDENTIALITY. Every notice of appeal or other document that is filed in the court and that is required by law to be confidential shall refer to individuals only by one or more initials or other appropriate pseudonym or designation.

(9) CAPTIONS. Except as provided in s. 809.81 (8) or when "petitioner" has been substituted for an individual's name in the caption in an appeal from a domestic abuse protective order or harassment injunction, or when the clerk has given notice of a different caption, the caption of any document shall include the full name of each party in the circuit court and shall designate each party so as to identify each party's status in the circuit court and in the appellate court, if any. In the supreme court, "petitioner" shall be added to the designation of a party filing a petition for review. The designation of a party responding to a petition for review shall remain the same as in the court of appeals.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 104 Wis. 2d xi (1981); Sup. Ct. Order No. 93-18, 179 Wis. 2d xxi (1993); Sup. Ct. Order No. 93-20, 179 Wis. 2d xxv (1993); Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; Sup. Ct. Order No. 14-01, 2015 WI 21, filed 3-2-15, eff. 7-1-15; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: The 8-1/2 x 11 letter size paper is adopted as the standard size for all papers to be filed in the Court of Appeals in place of using both 8-1/2 x 14 and 8-1/2 by 11. A standard size paper simplifies records management. There is a national trend away from legal size paper. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1981: Sub. (2) is amended to clarify that an original must be filed with the 4 copies in the court of appeals or with the 8 copies in the supreme court. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: Subsection (2) was amended to eliminate the distinction between "original" and "copy," because current technology produces copies of quality as good as the original. Subsection (8) requires that only the first name and last initial be used in all documents in confidential cases. [Re Order No. 00-02 effective July 1, 2001]

Judicial Council Note, 2002: Subsection (9) is created to clarify that the same caption should be used on all documents filed in an appellate case, and specifies that caption. Captions on pleadings and other documents filed pursuant to this rule are consistent with the current s. 809.19 (9) requirement governing captions on briefs. [Re Order No. 02-01 effective January 1, 2003]

809.82 Rule (Computation and enlargement of time). (1) COMPUTATION. In computing any period of time prescribed by these rules, the provisions of s. 801.15 (1) and (5) apply.

(2) ENLARGEMENT OR REDUCTION OF TIME. (a) Except as provided in this subsection, the court upon its own motion or upon good cause shown by motion, may enlarge or reduce the time prescribed by these rules or court order for doing any act, or waive or permit an act to be done after the expiration of the prescribed time.

(b) Notwithstanding par. (a), the time for filing a notice of appeal or cross-appeal of a final judgment or order, other than in an appeal under s. 809.107 or an appeal under s. 809.30 or 809.32, may not be enlarged.

(c) The court may not enlarge the time prescribed for an appeal under s. 809.105 without the consent of the minor and her counsel.

(e) Notwithstanding par. (a), the time for filing a motion for reconsideration under s. 809.24 may not be enlarged.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 104 Wis. 2d xi (1981); 1981 c. 390 s. 252; 1991 a. 263; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii; Sup. Ct. Order No. 02-01, 2002 WI 120, 255 Wis. 2d xiii; 2005 a. 293; 2017 a. 258; Sup. Ct. Order No. 20-07, 2021 WI 37, filed 4-23-21, eff. 7-1-21.

Judicial Council Committee's Note, 1978: Sub. (1). The provisions of the Rules of Civil Procedure as to computation of time are adopted for appeals to avoid any problems resulting from a lack of uniformity.

Sub. (2) continues the first sentence of former Rule 251.45. It eliminates the second sentence of that Rule permitting the attorneys by stipulation to extend the time for filing briefs if the extension does not interfere with the assignment of the case because this procedure interferes with the ability of the court to monitor cases pending before it and because it is not always certain when a case will be on an assignment. The Supreme Court considers that deadlines as to briefs and other actions in the court should have priority over all matters except previously scheduled trials in circuit and county courts and deadlines set by a federal court. Requests for extensions are not, consequently, looked upon with favor by the court. [Re Order effective July 1, 1978]

Judicial Council Committee's Note, 1981: Sub. (2) is amended to permit the court of appeals to extend the time for filing a notice of appeal or cross-appeal in appeals under Rules 809.30 and 809.40 (1), which cover criminal appeals and postconviction motions and appeals in ch. 48, 51 and 55 cases. When read with Rules 809.30 and 809.40 (1), the rule was previously ambiguous regarding extensions of time to file a notice of appeal or cross-appeal in ch. 48, 51 and 55 cases. The amendment clarifies the rules. Other than appeals under Rules 809.30 and 809.40 (1), the time for filing a notice of appeal or cross-appeal may not be extended. [Re Order effective Jan. 1, 1982]

Judicial Council Note, 2001: Subsection (2) (d) was created to provide notice to the clerk of any motion affecting time limits. Subsection (2) (e) was created to facilitate computation of due dates on petitions for review. [Re Order No. 00-02 effective July 1, 2001]

The court of appeals abused its discretion by ordering oral argument one day after the petition for a writ was filed and served. State ex rel. Breier v. Milwaukee County Circuit Court, 91 Wis. 2d 833, 284 N.W.2d 102 (1979).

The authority to extend the time for filing a notice of appeal under sub. (2) does not apply to appeals regarding terminations of parental rights under s. 809.107. Gloria A. v. State, 195 Wis. 2d 268, 536 N.W.2d 396 (Ct. App. 1995), 95-0315.

A claim of ineffective assistance of appellate counsel must be brought by a petition for writ of habeas corpus. Utilizing sub. (2) as a substitute for habeas corpus, so as to avoid making a substantive determination that a defendant was denied the effective assistance of appellate counsel constitutes an erroneous exercise of discretion. State v. Evans, 2004 WI 84, 273 Wis. 2d 192, 682 N.W.2d 784, 02-1869. See also Santana v. Endicott, 2006 WI App 13, 288 Wis. 2d 707, 709 N.W.2d 515, 05-0332.

It is unwise and unhelpful to replace the good cause standard for deciding extension motions under this section with an ineffective assistance of counsel analysis under *Evans* when deciding requests for extensions of time to file notices of intent to pursue postconviction relief. State v. Quackenbush, 2005 WI App 2, 278 Wis. 2d 611, 692 N.W.2d 340, XX-02-0489.

The writ of habeas corpus may be used in the court of appeals to seek relief from a termination of parental rights (TPR) even though there is no restraint of liberty of the petitioner, when appellate counsel failed to appeal before the deadline. Under sub. (2) (b), the time for filing an appeal of a TPR may not be enlarged when the petition was filed by someone other than a representative of the public. If the court was not able to recognize the petitioner's right to raise ineffectiveness of counsel, the petitioner will never have an appeal through no fault of his or her own. Amy W. v. David G., 2013 WI App 83, 348 Wis. 2d 593, 834 N.W.2d 432, 13-0731.

809.83 Rule (Penalties for delay or noncompliance with rules). (1) DELAY; EXTRA COSTS AND DAMAGES. (a) If the court finds that an appeal was taken for the purpose of delay, it may award any of the following:

1. Double costs.
2. A penalty in addition to interest not exceeding 10 percent on the amount of the judgment affirmed.
3. Damages occasioned by the delay.
4. Reasonable attorney fees.

(b) A motion for costs, penalties, damages and fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, the cross-respondent's brief.

(2) NONCOMPLIANCE WITH RULES. Failure of a person to comply with a court order or with a requirement of these rules, other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 151 Wis. 2d xvii (1989); 1995 a. 225; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii.

Judicial Council Committee's Note, 1978: Former ss. 251.22, 251.23, 251.51, 251.56, 251.57, 251.73, 251.75, 251.77, 251.81, 251.82, 251.85 and 251.89, providing for specific penalties for delay and for certain rule violations, are replaced. In the event of a rule violation, the court is authorized to take such action as it considers appropriate. If the court finds an appeal was taken for purposes of delay, it can impose one or more of the four types of penalties specified in sub. (1). [Re Order effective July 1, 1978]

Judicial Council Note, 2001: Subsection (2) is changed to allow appellate courts to sanction parties who violate court orders. [Re Order No. 00-02 effective July 1, 2001]

The untimely service of a petition filed under s. 808.10 does not affect jurisdiction, but the opposing party may move to dismiss under sub. (2). State v. Rhone, 94 Wis. 2d 682, 288 N.W.2d 862 (1980).

Summary reversal of a dismissal order as a sanction under sub. (2) entitled the plaintiffs to a trial without consideration of the issue that resulted in the dismissal. State ex rel. Blackdeer v. Town of Levis, 176 Wis. 2d 252, N.W.2d (Ct. App. 1993).

To dismiss an appeal under sub. (2), there must be demonstrated egregious conduct or bad faith on the party's or attorney's part. In certain cases attorney bad faith may be imputed to the party, but the attorney conduct should involve the same litigation. It was improper to consider an attorney's repeated requests for time extensions in other cases in denying a motion and dismissing the appeal. State v. Smythe, 225 Wis. 2d 456, 592 N.W.2d 628 (1999), 97-3191.

The court of appeals may not grant summary reversal of a circuit court order on appeal as a sanction without a finding of bad faith, egregious conduct, or a litigant's abandonment of the appeal. Raz v. Brown, 2003 WI 29, 260 Wis. 2d 614, 660 N.W.2d 647, 01-2436.

809.84 Rule (Applicability of rules of civil procedure). An appeal to the court is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978).

809.85 Rule (Continuation, appearance, substitution or withdrawal of counsel). (1) APPOINTED COUNSEL TO CONTINUE. An attorney appointed by a lower court in a case or proceeding appealed to the court shall continue to act in the same capacity in the court until the court relieves the attorney or as allowed under sub. (3), (4), or (5) (b).

(2) NONADMITTED COUNSEL. (a) Counsel not admitted to practice law in Wisconsin but admitted pro hac vice in the circuit court case shall provide the clerk with a copy of the circuit court's order admitting counsel pro hac vice and then may appear before the court in association with counsel admitted to practice law and in good standing in Wisconsin. Wisconsin counsel shall sign every document filed in the court and shall be present in person in all proceedings unless excused by the court.

(b) Counsel not admitted to practice law in Wisconsin may move the court for pro hac vice admission and shall state by affidavit that counsel is admitted to practice law and is in good standing to practice law in another jurisdiction and that counsel has complied with SCR 10.03 (4). If the motion is granted, counsel may appear before the court in association with counsel admitted to practice law and in good standing in Wisconsin. Wisconsin counsel shall sign every document filed in the court and shall be present in person in all proceedings unless excused by the court.

(c) For good cause the court may revoke the privilege granted herein of any counsel admitted pro hac vice to appear in any proceeding.

(3) NOTICE OF LIMITED APPEARANCE. If an attorney's scope of representation is limited, notices under s. 802.045 of limited appearance and of termination of limited appearance shall be filed with the court and served on the client and all parties. Upon the filing of the notice of termination of limited appearance, the clerk shall enter the withdrawal of counsel on the court docket without a court order.

(4) SUBSTITUTION OF COUNSEL. (a) *Applicability*. This subsection does not apply to counsel appointed for a person under s. 809.107 or 809.30 (2) (e) or ch. 977 or by the circuit court for postconviction, postcommitment, or postdisposition proceedings under s. 809.107, 809.30, or 809.32.

(b) *Substitution by mutual consent*. 1. An attorney for a party to an appeal or other appellate court proceeding may withdraw upon the party's consent by filing a notice of withdrawal signed by the party and withdrawing counsel and accompanied by a notice of substitution of counsel signed by substitute counsel. The notice of substitution of counsel must provide the substitute attorney's name, mailing address, electronic mail address, if any, and telephone number. Upon the filing of a notice of withdrawal and notice of substitution of counsel, the clerk shall enter the substitution on the court docket without a court order.

2. Substitution of counsel without the signature of withdrawing counsel may be allowed for good cause shown and upon such terms as shall be just.

(c) *Entry of appearance by members or employees of law firms, professional corporations, legal assistance clinics, and agencies*. The entry of an appearance as attorney of record by an attorney who is a member or an employee of a law firm, professional corporation, legal assistance clinic, or agency representing a party to the appeal or other appellate court proceeding shall relieve other members or employees of the same law firm, professional corporation, legal assistance clinic, or agency from the necessity of filing a notice of withdrawal and substitution of counsel. Upon entry of such appearance, the clerk shall enter the substitution of counsel on the court docket without a court order unless the entry of appearance indicates that the attorneys will serve as co-counsel.

(5) WITHDRAWAL OF COUNSEL. (a) *Applicability*. This subsection does not apply to counsel appointed for a person under s. 809.107 or 809.30 (2) (e) or ch. 977 or by the circuit court for postconviction, postcommitment, or postdisposition proceedings under s. 809.107, 809.30, or 809.32.

(b) *Withdrawal by consent*. Other than in an appeal under s. 809.107 or 809.30, an attorney for a party to an appeal or other appellate court proceeding may withdraw as counsel of record upon the party's consent by filing a notice of withdrawal signed by the party indicating consent. The notice shall indicate the party's last known address unless disclosure of the address would violate a standard of professional responsibility. Upon the filing of a notice of withdrawal indicating the party's consent, the clerk shall enter the withdrawal on the court docket without a court order.

(c) *Withdrawal by motion*. An attorney desiring to withdraw as counsel of record for a party to an appeal or other appellate court proceeding who is unable to obtain the party's consent under par. (b), or in an appeal under s. 809.107 or 809.30, must file a motion to withdraw. The motion shall be filed in the court in which the appeal or other appellate court proceeding is pending.

(d) *Referral for appointment of counsel by the state public defender*. If the appeal or other appellate court proceeding is one in which the client may be eligible for the appointment of counsel under s. 809.107 or 809.30 (2) (e) or ch. 977, and if the client requests representation by the state public defender, the attorney shall serve a copy of the motion to withdraw on the appellate division intake unit in the Madison appellate office of the state public defender and refer the client to the appellate division intake office for indigency determination and the possible appointment of counsel. When a client is referred to the state public defender, within 20 days after receipt of a motion to withdraw filed and served under par. (e), the state public defender shall notify the court in which the motion was filed of the status of the determination of the client's indigency and whether the state public defender will appoint counsel.

(e) *Content of motion to withdraw as counsel*. A motion to withdraw as counsel must include all of the following items:

1. The client's name and last known address, unless disclosure of the address would violate a standard of professional responsibility.

2. A statement that at least 14 days before the motion was filed the client was notified in person, by mail, by electronic mail, or by phone of all of the following information:

a. Counsel's intent to withdraw.

b. Of the right to object to the motion within 11 days after service of the motion.

c. That unless the client retains or obtains new counsel, the client is personally responsible for keeping the court and the other parties informed where notices, briefs, or other papers may be served and complying with all court orders and time limitations established by the rules of appellate procedure or by court order, and that if the client fails or refuses to comply with court orders and established time limitations, the client may suffer possible dismissal, default or other penalty.

d. The date of any pending deadline or required filing in the appeal or other appellate proceeding.

e. If the client is not a natural person, that the client must be represented by counsel unless the appeal is taken from a small claims case.

3. When referral to the state public defender is required under par. (d), a statement that the referral was made and the date it was made.

4. A statement that the motion was served on the client, all parties to the appeal, and the appellate division intake unit in the Madison appellate office of the state public defender when referral to the state public defender is required under par. (d).

5. If counsel was unable to give the client the notice required under subd. 2., a statement that attempts to give notice have failed and an explanation of what good faith efforts counsel made to satisfy the notice requirement.

6. The reasons for withdrawal under SCR 20:1.16 and the facts relevant to the reasons or factors in the withdrawal determination under par. (f), unless an explanation of the reasons and facts would violate a standard of professional responsibility.

(f) *Factors in withdrawal determination*. The court may approve withdrawal under appropriate terms and conditions. The court may consider the following factors in deciding the attorney's motion to withdraw:

1. Whether the client has been given reasonable notice and opportunity to obtain substitute counsel.
2. Complexity of the case, the length of time the attorney has served as counsel of record, and preparatory work completed.
3. The amount of fees paid or owed.
4. Whether the request is made to manipulate the appellate process.
5. Whether the attorney-client relationship is irrevocably broken.
6. Prejudice to any party.
7. Delay caused by the withdrawal of counsel of record.
8. Whether the office of the state public defender will appoint counsel.
9. Such other factors as the court may determine to be relevant.

(g) *Time tolled*. The filing of a motion to withdraw under this section automatically tolls the time for performing an act required by the rules of appellate procedure or court order from the date the motion was filed until the date motion is disposed of by order. The time for filing a petition for review under s. 808.10 is not tolled.

(h) *Motion not necessary*. Upon the filing of a petition for review by a self-represented person or new counsel, the clerk shall enter the withdrawal of counsel or substitution of counsel on the court docket without a court order.

(6) CLIENT'S FILE. The withdrawing attorney shall surrender to the client or successor counsel the papers and property to which the client is entitled within 14 days of counsel's receipt of the client's or successor counsel's request, unless the court orders otherwise.

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); Sup. Ct. Order, 151 Wis. 2d xxv (1989); Sup. Ct. Order No. 20-05, 2021 WI 25, filed 3-9-21, eff. 7-1-21; 2021 a. 240 s. 30.

Judicial Council Committee's Note, 1978: Rule 809.85 continues former Rule 251.88. [Re Order effective July 1, 1978]

Judicial Council Note, 1990: See ss. 48.235 (7), 767.045 (5) and 880.331 (7).

NOTE: Sup. Ct. Order No. 20-05 states that "the Judicial Council Note to Wis. Stat. § 809.85 is not adopted but will be published and may be consulted for guidance in interpreting and applying the rule."

Judicial Council Note, 2021: Subsection (5)(a) is not intended to supersede Rule 809.30(4), which governs the withdrawal of appointed counsel. Subsection (6) is consistent with SCR 20:1.16(d) and only adds a time limit in which counsel must act. Subsection (6) allows the court to defer the surrender of papers and property to the client when the appointment of new counsel is anticipated.

In this section, "the court" means the court of appeals. Once a timely notice of appeal is filed, the court of appeals gains jurisdiction over the case and the circuit court no longer has jurisdiction to remove court appointed counsel. Roberta Jo W. v. Leroy W., 218 Wis. 2d 225, 578 N.W.2d 185 (1998), 96-2753.

809.86 Rule (Identification of victims and others in briefing, petitions for review, and responses to petitions for review). (1) DECLARATION OF POLICY. By enacting this rule, the supreme court intends to better protect the privacy and dignity interests of crime victims. It requires appellate briefs, petitions for review, and responses to petitions for review to identify crime victims by use of identifiers, as specified in sub. (4), unless there is good cause for noncompliance. The rule protects the identity of victims in appellate briefs, petitions for review, and responses to petitions for review that the courts make available online.

(2) APPLICABILITY. This section applies to appeals in the following types of cases:

(a) Section 971.17 proceedings.

(b) Criminal cases.

(c) Chapter 938 cases.

(d) Chapter 980 cases.

(e) Certiorari review of decisions or orders entered by the department of corrections, the department of health services, or the parole commission in a proceeding or case specified in pars. (a) to (d).

(f) Collateral challenges to judgments or orders entered in a proceeding or case specified in pars. (a) to (e).

(3) DEFINITION. In this section, "victim" means a natural person against whom a crime, other than a homicide, has been committed or alleged to have been committed in the appeal or proceeding. "Victim" does not include the person convicted of or alleged to have committed a crime at issue in the appeal or proceeding.

(4) BRIEFS, PETITIONS FOR REVIEW, AND RESPONSES TO PETITIONS FOR REVIEW. In an appeal specified under sub. (2), the briefs of the parties, petitions for review, and responses to petitions for review shall not, without good cause, identify a victim by any part of his or her name but may identify a victim by one or more initials or other appropriate pseudonym or designation.

(5) PROTECTIVE ORDER. For good cause, the court may make any order necessary to protect the identity of a victim or other person, or to excuse compliance with this section.

History: Sup. Ct. Order No. 14-01, 2015 WI 21, filed 3-2-15, eff. 7-1-15; 2017 a. 365 s. 111; Sup. Ct. Order No.19-19, 2020 WI 6, filed 1-29-20, eff. 7-1-20.

NOTE: **Sup. Ct. Order No. 14-01 states, "The Judicial Council Note to Wis. Stat. § (RULE) 809.86 is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.**"

Judicial Council Note, 2015: Proposed s. 809.86 addresses victim privacy concerns that result from public access to searchable documents posted on the Wisconsin Supreme Court and Court of Appeals access website. The proposed rule is intended to protect victims' constitutional and statutory rights to be treated with fairness, dignity, courtesy, sensitivity, and respect for their privacy. *See* Wis. Const. Article I, section 9m; Wis. Stat., s. 950.01. Specifically, the rule protects the identity of victims in appellate briefs that the courts make available online. The rule does not extend to other appellate filings, including appendices, because these documents are not currently posted electronically.

The proposed rule is not a rule of confidentiality or privilege. It is not intended to limit a defendant's right to a public trial, to limit the availability of any potential appellate argument or remedy, or to affect laws regarding public records or open court records that are available in the clerks of courts offices.

The rule is intended to address only matters in which the state has alleged or proved that a party in the appeal or proceeding has committed criminal conduct against one or more victims in the matter. Accordingly, sub. (2) is limited to matters in which victims of crime are most frequently referenced and identified as victims or alleged victims.

Subsection (3) provides a definition of a "victim" that includes an alleged victim. In some appeals, a party's position will be that there was in fact no victimization, and nothing in this proposed rule is intended to limit arguments to that effect.

The privacy issues addressed by the rule do not extend to a deceased victim in the same manner. Therefore, subsection (3) permits the victim of a homicide to be recognized in an appellate brief.

Subsection (4) prohibits the use of any part of a victim or alleged victim's name except initials. Subsection (4) does not prescribe or limit the use of other pseudonyms for victims, as long as they maintain sensitivity and respect for victims.

Subsection (5) allows an appellate court to make any necessary order to further protect the identity of victims or to protect the identity of other persons not otherwise covered by the rule. It also allows the court to excuse compliance with this section.

Comment, 2020: By S. Ct. Order 19-19, 2020 WI 6 (issued Jan. 29, 2020, eff. July 1, 2020) the court extended the privacy protections of this rule to petitions for review and responses to petitions for review, so that they may be posted on the Wisconsin Supreme Court and Court of Appeals case access website, along with appellate briefs, in a manner that respects victim privacy concerns.

Appendix G

Interim Court Rule Governing Filing in the Wisconsin Supreme Court for Judicial/Attorney Proceedings

2023 WI 47

SUPREME COURT OF WISCONSIN

NOTICE
This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 23-03

In re Interim Rule Governing Filing in the Wisconsin Supreme Court For Judicial/Attorney Proceedings.

FILED

JUNE 12, 2023

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

This matter comes before the Wisconsin Supreme Court upon the court's own motion as part of the phased transition to mandatory electronic filing in Wisconsin's appellate courts. This order addresses the requirements for the filing and service of documents in "judicial/attorney proceedings," defined infra, before the Wisconsin Supreme Court, following the implementation of mandatory eFiling for all other cases, as set forth in S. Ct. Order 19-02C & 20-07C, 2023 WI 10 (issued Feb. 21, 2023, eff. Apr. 1, 2023), and the corresponding Second Amended Revised Interim Rule.

That order, among other things, made eFiling mandatory for all Wisconsin Supreme Court proceedings, other than judicial/attorney proceedings, as of July 1, 2023. That order also indicated that "[t]he court will adopt a new interim rule, effective July 1, 2023, that will govern filings in, and the transition to eFiling in, a limited number

of categories of proceedings, some of which are not otherwise subject to the provisions of Wis. Stat. ch. 809." Judicial/attorney proceedings were defined as follows:

> [J]udicial disciplinary proceedings initiated under Wis. Stat. § 757.85; attorney regulatory proceedings initiated under SCR ch. 22 and SCR ch. 40; petitions for readmission to the practice of law; petitions for reactivation of an attorney's license to practice law; and petitions for reinstatement following an administrative suspension for failure to pay bar dues and assessments, for failure to comply with mandatory reporting of continuing legal education/ethics and professional responsibility credits, for failure to file a trust account certificate, and for failure to enroll in the State Bar of Wisconsin.

As explained in Order 19-02C & 20-07C, "[b]ecause of the unique character of these categories of proceedings and the need for the development of eFiling systems that will accommodate them, these categories of proceedings will not transition to mandatory eFiling as of July 1, 2023." In particular, several of these categories consist of proceedings presided over by the Wisconsin Supreme Court that, at least in part, do not involve filings subject to the Wisconsin Rules of Appellate Procedure, Wis. Stat. ch. 809. Many of these filings are in the form of documents commonly submitted at the circuit court level. Currently, the Wisconsin Supreme Court and Court of Appeals Case Access ("WSCCA") system is not configured to handle electronic filings for such proceedings.

This court therefore adopts the Interim Rule Governing Filing in the Wisconsin Supreme Court For Judicial/Attorney Proceedings, attached as Appendix A, to govern the filing and service of documents in judicial/attorney proceedings as of July 1, 2023. The interim rule

shall remain in effect until the WSCCA system has been updated to allow eFiling in such cases and until further order of this court.

Therefore,

IT IS ORDERED that the Clerk of the Supreme Court, in collaboration with the Consolidated Court Automation Programs ("CCAP") and the supreme court, shall develop processes and procedures to expand the capability of the WSCCA system to allow for eFiling of all documents in the categories of judicial/attorney proceedings described above, including filings not subject to Wis. Stat. Ch. 809;

IT IS FURTHER ORDERED that the Clerk of the Supreme Court shall provide updates to this court, beginning September 1, 2023, and every six months thereafter, as to the status of updating the WSCCA system to allow eFiling in such cases;

IT IS FURTHER ORDERED that the Interim Rule Governing Filing in the Wisconsin Supreme Court For Judicial/Attorney Proceedings, attached as Appendix A, is adopted, effective July 1, 2023, governing filing and service requirements of documents in judicial/attorney proceedings;

IT IS FURTHER ORDERED that the Interim Rule Governing Filing in the Wisconsin Supreme Court For Judicial/Attorney Proceedings shall remain in effect until such time as the WSCCA system has been updated to allow eFiling in such cases and until further order of this court; and

IT IS FURTHER ORDERED that notice of this order and attached Appendix A shall be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases and on the Wisconsin court

system's web site. The State Bar of Wisconsin shall provide notice of this order and the attached Appendix A.

Dated at Madison, Wisconsin, this 12th day of June, 2023.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

Appendix A

Interim Rule Governing Filing in the Wisconsin Supreme Court For Judicial/Attorney Proceedings.

1. Effective Date. This interim rule shall be effective July 1, 2023.

2. Statement of purpose; authority. The Wisconsin Supreme Court is in the process of implementing a phased transition to mandatory electronic filing in the appellate courts of Wisconsin. On February 21, 2023, this court adopted the Second Amended Revised Interim Rule governing electronic filing and service in the Wisconsin Supreme Court. S. Ct. Order 19-02C & 20-07C, 2023 WI 10 (issued Feb. 21, 2023, eff. Apr. 1, 2023). That order, among other things, made electronic filing mandatory for all Wisconsin Supreme Court proceedings, other than "judicial/attorney proceedings" (see Paragraph 3, infra), as of July 1, 2023. That order also indicated that "[t]he court will adopt a new interim rule, effective July 1, 2023, that will govern filings in, and the transition to eFiling in, a limited number of categories of proceedings, some of which are not otherwise subject to the provisions of Wis. Stat. ch. 809." This interim rule sets forth the rules under which the filing and service of all documents in judicial/attorney proceedings before the Wisconsin Supreme Court will be governed as of July 1, 2023, until further order of this court.

3. Scope/matters affected. This interim rule governs the filing and service requirements for documents in judicial/attorney proceedings before the Wisconsin Supreme Court. Such proceedings are defined as follows: Judicial disciplinary proceedings initiated under Wis. Stat. § 757.85; attorney regulatory proceedings initiated under SCR ch. 22 and SCR ch. 40; petitions for readmission to the practice of law; petitions for reactivation of an attorney's license to practice law; and petitions for reinstatement following an administrative suspension for failure to pay bar dues and assessments, for failure to comply with mandatory reporting of continuing legal education/ethics and professional responsibility credits, for failure to file a trust account certificate, and for failure to enroll in the State Bar of Wisconsin.

4. Filing and service. To the extent that judicial/attorney proceedings are subject to the Rules of Civil Procedure (Wis. Stat. ch. 801 to 807) or Rules of Appellate Procedure (Wis. Stat. ch. 809), they shall be subject to the current versions of those rules, except as set forth below. Notwithstanding the provisions of Wis. Stat. §§ 801.18(1)(L), 801.18(3), 809.01(25), and 809.801(3), any party to a judicial/attorney proceeding in the Wisconsin Supreme Court, even if represented by counsel, shall be considered to be a "paper party" for the purpose of the Rules of Civil Procedure and Rules of Appellate Procedure, and shall sign, file, and serve documents by "traditional methods," as set forth in those rules. Any party to a judicial/attorney proceeding that is not governed by the Rules of Civil Procedure or Rules of Appellate Procedure shall continue to sign, file, and serve documents by

traditional paper methods, as set forth in the governing Supreme Court Rules for such proceedings.

5. Transition to eFiling. As set forth in the accompanying Order, the Clerk of the Supreme Court, in collaboration with the Consolidated Court Automation Programs ("CCAP") and the supreme court, shall develop processes and procedures to expand the capability of the Wisconsin Supreme Court and Court of Appeals Case Access ("WSCCA") system to allow for eFiling of all documents in the above-described categories of judicial/attorney proceedings. Once WSCCA has been so updated, the court will issue one or more orders transitioning judicial/attorney proceedings to eFiling. The transition to eFiling may occur in phases depending on the progress of the updates to WSCCA and the needs of the court.

6. Application; revision. This interim rule is temporary and is subject to change by CCAP and the Clerk, upon notice to and approval by the court, as the needs of the court dictate.

7. Termination. This interim rule shall continue to remain in effect until further order of this court.

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[1] Unless otherwise indicated, all references in this appendix to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes, as affected by acts through 2023 Wis. Act 36 and by supreme court orders filed before and in effect on Oct. 4, 2023; all references in this chapter to the United States Code (U.S.C.) are current through Pub. L. No. 118-19 (Oct. 6, 2023); and all references to form numbers are to Wisconsin Court of Appeals forms, as updated through May 18, 2023.

[1] The court of appeals provides all litigants in expedited appeals this summary of the applicable rules for briefing. It is also available on the Wisconsin Court System's website, at https://www.wicourts.gov/courts/appeals/filing.htm (follow "Rules for expedited briefing" hyperlink) (last updated Oct. 21, 2021). For further information on procedures in expedited appeals, see chapter 21, *supra*.

[1] All references to the Wisconsin Statutes are to the 2021–22 Wisconsin Statutes as affected by acts through 2023 Wis. Act 36.